

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Vol. II

* * * * *

THE UNITED STATES

-v-

THE MERCHANT DIAMOND GROUP, INC.,

Defendant.

* * * * *

CRIMINAL DOCKET
MISC. CR. 214

Proceedings held before the HON. JOHN T. CURTIN, United
States District Judge, in Part I, United States Court House,
Buffalo, New York. commencing on April 20, 1977.

APPEARANCES:

RICHARD J. ARCARA, United States Attorney,
by L. GEORGE PARRY, Attorney, United
States Department of Justice.

SAPERSTON, DAY & RADLER, Attorneys for the
Defendant; THOMAS F. SEGALLA, Esq., of
Counsel.

BOREANAZ, NeMOYER & BAKER, Attorneys for
HENRY FESTA; HAROLD J. BOREANAZ, Esq.,
of Counsel.

COLE, SORRENTINO, CAVANAUGH & STEPHENSON,
Attorneys for various individuals;
ROBERT S. STEPHENSON, Esq., and STEPHEN E.
CAVANAUGH, Esq., of Counsel; THOMAS E.
ANDRUSCHAT, Esq., Attorney for LAWRENCE
McINTYRE.

ADRIAN R. WEISSFELD, Esq., Attorney for
LAWRENCE JAFFAY.

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1 PROCEEDINGS: April 20, 1977.

2 APPEARANCES: As before noted.

3

4 THE COURT:

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MR. SEGALLA:

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MR. STEPHENSON:

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MR. ANDRUSCHAT:

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MR. WEISSFELD:

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MR. BOREANAZ:

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THE COURT:

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Why not note the appearances so a record can be made in the event I sign the order or a record can be made of the objections and who is here and who is making objection. As far as individual representations, would you please just simply tell Mr. Knisley who you represent.

Saperston, Day & Radler, representing the corporation Merchant Diamond Group, Inc., Thomas Segalla.

Cole, Sorrentino, Cavanaugh & Stephenson for individual defendants, or individual people subject to grand jury subpoena; Robert Stephenson and Stephen Cavanaugh.

Thomas Andruschat for Lawrence McIntyre who is subpoenaed before the grand jury.

Adrian Weissfeld for Lawrence Jaffay.

I represent Henry Festa.

Mr. Parry, would you sign the application, please.

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1 MR. PARRY:

Yes, sir.

2 THE COURT:

3 For purposes of a title this would
4 be a Miscellaneous Criminal number, the
5 next Miscellaneous Criminal number, Mr.
6 White, entitled the United States against
7 The Merchant Diamond Group, Inc. Mr. Parry,
8 will you explain to the extent possible
9 the nature of your application and the
10 need for it and what you are requesting
the Court to do at this time.

11 MR. PARRY:

12 The application is for an order
13 sealing the affidavits and applications
14 which were made previously to this date
15 for various orders of the Court, search
16 warrants issued by this Court which are
17 recited in the application as well as a
18 search warrant issued by Judge Heffron
19 in County Court during the absence of
20 this Court from the City of Buffalo. The
21 order would require the sealing for a
22 period of sixty days and I am at somewhat
23 of a disadvantage under the circumstances
24 to go into the particular reasons for the
25 necessity of the sealing except that for
the next sixty days the investigation will

1 be continuing and it has been determined
2 by the persons who are conducting the
3 investigation that it would be detrimental
4 to disclose certain sources of information
5 which are recited in the affidavit for
6 the search warrant, the original search
7 warrant for Suite 1629, Statler Hilton
8 Hotel. That affidavit is incorporated in
9 the applications and affidavits for the
10 orders that have been issued in this
11 original investigation.

12 THE COURT:

As I understand your application as
13 I read it from the application, you seek
14 an order directing the Clerk of this
15 court to seal and hold under seal for a
16 period of sixty days the applications and
17 affidavits for each of the above orders
18 and warrants. In that respect I suppose
19 that if it becomes unnecessary to continue
20 this, then you would come to the Court,
21 notify the Court as soon as possible and
22 we would open the record.

23 MR. PARRY:

Yes, sir. In that regard it is
24 entirely possible that before the sixty-
25 day period has expired we would make such

1 an application.

2 THE COURT:

3 Secondly, you ask for an order
4 directing the Clerk of Erie County to
5 seal and hold under seal for a period of
6 sixty days the application, affidavit for
7 the warrant issued by Judge Heffron on
8 April 15, 1977. As I understand, the
9 reason why you went to Judge Heffron was
10 that last Friday was that Judge Elfvin
11 and I, and as a matter of fact Judge
12 Burke in Rochester were out of the district
13 attending a meeting and the Magistrate
14 was out of the district as well and I
15 realize that the basis of federal juris-
16 diction here is your claim of mail fraud
17 but should this particular order be
18 submitted to me or should it go to Judge
19 Heffron as far as sealing the County
20 Court record?

21 MR. PARRY:

22 Well, in that regard we took the
23 matter up with Judge Heffron as to before
24 whom the return should be made and further
25 proceedings should be had in regard to
his own order and it was determined at
that time that any further proceedings

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1 relating to the disposition of that order
2 such as returns, filing or what have you
3 should be taken up with you and that's
4 the reason for submitting that order to
5 you. If you would prefer, however, we
6 can submit it to him.

7 THE COURT:

I do not want to buck it back and
8 forth. What I want to be sure of is that
9 the Clerk of Erie County, if I sign an
10 order, that he will honor it and not, -
11 the thing it seems to me I do not want to
12 get into any kind of a dispute with the
13 Clerk about whether or not he should
14 honor my orders and we have enough
15 trouble with state courts now as to their
16 attitude towards, - would you perhaps make
17 some kind of a supplemental filing, an
18 affidavit explaining your conversation
19 with Judge Heffron just so we simply have
20 that as part of the record.

21 MR. PARRY:

Yes, sir.

22 THE COURT:

23 Then you ask for an order directing
24 the Clerk of this Court to seal this
25 application. That is, the application
being made today. Then you then go on to

1 say that is to all the above described
2 documents Canadian-American law enforce-
3 ment authorities be permitted to retain
4 and utilize working copies of said documents
5 for use in their investigation. That
6 would be simply the copies of the
7 affidavits, I suppose, that you would just
8 keep in your file in the regular course.

9 MR. PARRY: Yes.

10 THE COURT: The other question I have is that
11 you have made the return before me as to
12 the search warrants that were issued by
13 this Court.

14 MR. PARRY: Yes.

15 THE COURT: I take it you have also made a
16 return before Judge Heffron.

17 MR. PARRY: No, sir. Judge Heffron's order
18 directed us to make the return before you,
19 which we did.

20 THE COURT: That was part of the return that you
21 made before me?

22 MR. PARRY: Yes, sir.

23 THE COURT: All right. As far as the returns
24 were detailed and there were certainly
25 a number of items seized. As I understand

1 it you do not seek the prevention of
2 giving to counsel copies of the returns
3 at this time.

4 MR. PARRY:

That's correct, Judge, and as a
5 matter of fact, copies of the returns, -
6 the returns incorporate the receipts that
7 were actually left at the various scenes
8 where the searches were made so that those
9 same receipts are available to counsel.

10 THE COURT:

You have the receipts which are the
11 same as the returns as far as detailing
12 the items?

13 MR. PARRY:

Yes, sir.

14 THE COURT:

On the application does anyone want
15 to say anything at this time?

16 MR. SEGALLA:

Your Honor, I wasn't aware when I
17 came over here that a formal application
18 was going to be made at this point in time.
19 I am with the Saperston firm which
20 represents the Merchants Diamond Group,
21 Inc. Our position is quite simple,
22 although the ramifications are quite
23 great, that being the assets in the
24 neighborhood of 1.5 million dollars were
25 seized which in fact puts us out of

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1 business and without our having the
2 ability to look at the information and
3 affidavits we are prevented from making
4 the necessary motions that might follow
5 to get this property and that is basically
6 our position.

7 THE COURT:

8 You cannot get the information which
9 is on the particular affidavits if the
10 application is granted but, on the other
11 hand, certainly you can confer with your
12 clients; you can make an application from
13 those sources and from any other sources
14 to make an application for the Court to
15 lift the order if I should grant the
16 order.

17 MR. SEGALLA:

18 Granted, but I feel that the informa-
19 tion that may be contained in these
20 affidavits would be the type of information
21 that would be necessary for the proper
22 application to be brought in our behalf
23 before this Court to get the return of
24 the property and a sixty-day sealing of
25 this information would be prohibitive as
far as the business standpoint of our
client to continue in business. We are

1 in effect out of business.

2 THE COURT: All right. Anything else? Mr.
3 Boreanaz.

4 MR. BOREANAZ: Your Honor, I represent Mr. Festa
5 who has been subpoenaed as a witness to
6 appear before the grand jury. I am
7 advised that he was here this morning.
8 I did not represent him at that time and
9 that his appearance before the grand jury
10 was adjourned to accommodate the effectua-
11 tion of counsel, completion of arrangements
12 with respect to counsel. My position,
13 your Honor, is that I have no economic
14 standing in anything that was seized, at
15 least my client doesn't, but there were
16 a number of items that were seized from
17 the premises in question and surrounding
18 the premises and I am at a loss to advise
19 my client as to how to proceed before the
20 grand jury as to whether he should
21 exercise his Fifth Amendment privilege or
22 as to whether he should testify. I would
23 be desirous of making a decision with
24 respect to that. I think the Government,
25 if they don't care to provide us with

1 this information, ought to defer his
2 appearance before the grand jury until
3 such time as I have had a chance to see
4 these matters.

5 MR. PARRY: Your Honor, that would be agreeable
6 to the Government. As a matter of fact,
7 I believe I made that suggestion to Mr.
8 Weissfeld in regard to his client, that
9 we certainly don't want to take any unfair
10 advantage of anyone's client before the
11 grand jury and we would defer their
12 appearances.

13 THE COURT: Your clients, are they Buffalo
14 residents?

15 MR. WEISSFELD: Yes. I represent a Buffalo resident,
16 your Honor.

17 THE COURT: Mr. Boreanaz, your man --

18 MR. BOREANAZ: Yes, your Honor, he is from the Town
19 of Tonawanda.

20 MR. ANDRUSCHAT: Mine also is from Buffalo.

21 THE COURT: You have a grand jury witness?

22 MR. ANDRUSCHAT: Yes, your Honor.

23 THE COURT: Mr. Parry, the same thing apply?

24 MR. PARRY: Yes, sir.

25 THE COURT: Their appearance will be deferred?

1 MR. PARRY:

Yes, sir. As to anyone who is
2 subpoenaed to appear before the grand
3 jury, we would be agreeable to postpone
4 their appearances until after the affidavit
5 is unsealed.

6 THE COURT:

Mr. Stephenson, Mr. Cavanaugh, you
7 represent witnesses?

8 MR. CAVANAUGH:

Yes, your Honor, we represent witnesses.
9 You must also take into consideration these
10 individual witnesses who were former
11 employees of the target defendant here
12 are no longer employed. One of our
13 particular clients has a possibility for
14 a new job and a new position and there is
15 this cloud which is overhanging his
16 entire life and it is easy to say they
17 will defer for sixty days, but for sixty
18 days somebody is under subpoena and there
19 has been no indication whether or not
20 they're going to offer that particular
21 or any one of the employees that we
22 represent immunity and just to defer it
23 will not help us out in re-establishing
24 our position in the community.

25 THE COURT:

He being a witness is certainly no

1 cloud. Being an employee of a corporation
2 which is being investigated is no cloud.
3 Being an associate of particular persons
4 or being investigated is no cloud.

5 MR. CAVANAUGH:

Except for the many newspaper articles,
6 many of which are inaccurate and whether
7 or not legally there is anything which
8 would attach to that, but as a practical
9 matter we all know really that it does.

10 THE COURT:

Mr. Stephenson.

11 MR. STEPHENSON:

Well, Mr. Cavanaugh and I are co-
12 counsel, your Honor.

13 MR. WEISSFELD:

Well, your Honor, I have been advised
14 by Mr. Parry that my client is a target
15 of this investigation. Now, I have been
16 in communication with him and interviewed
17 him over the last two days. At this
18 point I am at a loss to even know what he
19 is charged with. He doesn't know what he
20 is charged with. I have a man who is a
21 target. I have no idea what the possible
22 charges are. I have no idea what the
23 possible accusations are. I have no idea
24 whether or not the search warrant is
25 sufficient with probable cause required.

1 I believe that I need this information
2 to adequately defend a man who is a
3 target of the grand jury investigation.

4 THE COURT:

Mr. Parry, I would think that you
5 will have the obligation to tell us as
6 soon as you can that this order may be
7 unsealed. Maybe sixty days is not long
8 enough and if that is the case, then we
9 will have to consider a reapplication.
10 On the other hand, if sixty days is too
11 long, then you should say so and are
12 directed to come back. Is there any
13 difficulty with that arrangement?

14 MR. PARRY:

None at all, Judge.

15 THE COURT:

All right. I will grant the relief
16 requested and it will read for a period
17 of sixty days or less if sixty days is
18 not necessary. Certainly anyone who
19 desires may make, - in the interim may
20 make a further written application to the
21 Court with notice to the United States
22 Attorney to lift the sealing order. I
23 will certainly be glad to receive it upon
24 short notice and Mr. Parry will certainly
25 come over, I know, upon short application

1 from anyone, so that I know that as far
2 as your client is concerned, this is
3 certainly a mortal blow but I have
4 examined the affidavits when they were
5 presented to me and under the circumstances
6 it seems to me that the application of the
7 Government is in order and for the present
8 it should be granted. I urge that it
9 be just as short as possible. I direct
10 it be as short as possible.

11 MR. PARRY:

Yes, sir.

12 MR. ANDRUSCHAT:

Your Honor, for the record, my client
13 is excused from testifying until the
14 order is lifted?

15 THE COURT:

That will be the case. No witnesses
16 will be called until there is a lifting.

17 MR. SEGALLA:

Your Honor, might I for the record
18 clarify something. If I misunderstood
19 you can correct me. The granting of this
20 order does not foreclose us from making
21 an application for return of the property,
22 is that correct?

23 THE COURT:

For any application for any relief
24 you feel is appropriate, for the return.
25 As a matter of fact, maybe there are some

1 items here that you can talk to Mr. Parry
2 about. I am sure they will not be of
3 great value but maybe there are some things
4 that he can return at the present time.

5 MR. SEGALLA:

Thank you.

6 THE COURT:

As I explained, I will be glad to
7 hear your application at any time. We
8 will be in recess.

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10 (Recess taken at 5:02 p.m.)
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1 PROCEEDINGS:

April 27, 1977, 10:10 a.m.

2 APPEARANCES:

RICHARD J. ARCARA, United States Attorney,
by L. GEORGE PARRY, Attorney, United
States Department of Justice.

4

SAPERSTON, DAY & RADLER, Attorneys for
the Defendant; BRIAN P. FITZGERALD, Esq.,
of Counsel.

6

7 THE COURT:

Mr. Parry, Mr. Fitzgerald, since
money is the root of all evil, I thought
I would leave you two to the end. Of
course, you have more money. Some of us
other fellows had money. Maybe you do
not have as much as Mr. Teamer.

13 MR. PARRY:

The question now is whose money is
it.

15 THE COURT:

Were you able to find any authority,
Mr. Parry?

17 MR. PARRY:

Yes, sir. I will submit that now.
Judge, before we proceed any further, I
advised Mr. Fitzgerald on my way over here
this morning I received a telephone call
this morning from Postal Inspector Snyder.
He told me then that he has received word
that the affidavits for the search warrant
in New York City which was one of the
parallel searches was released or has been

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1 released and I would like an opportunity
2 before we spend anymore time on whether
3 or not our affidavit should be sealed to
4 find out what was in their affidavit and
5 whether or not it changes our circumstances.

6 THE COURT:

That affidavit might have been very
7 similar to the one given to me.

8 MR. PARRY:

I suspect it was but I would like to
9 check into that.

10 THE COURT:

Why don't you check into that. Is
11 that agreeable to you to have a brief
12 adjournment to have that done, Mr.
13 Fitzgerald?

14 MR. FITZGERALD:

As long as it is brief, your Honor.

15 THE COURT:

When do you think you can have that
16 information?

17 MR. PARRY:

I can have the information by this
18 afternoon.

19 THE COURT:

Why don't we meet tomorrow at the
20 same time. If you are here at 9:00 we
21 will take you first.

22 MR. FITZGERALD:

Well, I was here at 9:00. I thought
23 we would get on right away. Would it be
24 possible, - I know the school case is on
25 but would it be possible to get a response

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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1 today?

2 THE COURT: Be here at the end of the afternoon.

3 MR. FITZGERALD: In the afternoon?

4 THE COURT: Right. We will be here.

5 MR. FITZGERALD: This is a substantial business that
6 is in effect put out of business and we
7 are in the dark here and we have no
8 recourse. It seems as if the Government's
9 need to have these affidavits held in
10 secret may not be as great as the Court
11 thought because it seems a similar
12 affidavit --

13 THE COURT: If they were released in New York
14 perhaps they should be released here as
15 well. We will see you this afternoon.
16 I think that maybe by 4:30 we should be
17 clear.

18 MR. PARRY: I will be here, Judge.

19 MR. FITZGERALD: Good.

20 THE COURT: Why don't we say 5:00 o'clock.

21 MR. PARRY: Fine.

22

23 (Recess taken at 10:15 a.m.)

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* * * * *

1 PROCEEDINGS: April 27, 1977, 5:22 p.m.
2 APPEARANCES: RICHARD J. ARCARA, United States Attorney,
3 by L. GEORGE PARRY, Attorney, United
4 States Department of Justice.
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SAPERSTON, DAY & RADLER, Attorneys for
the Defendant; BRIAN P. FITZGERALD, Esq.,
of Counsel.

7 THE COURT: Do you have the order, Mr. Parry?

8 MR. PARRY: Yes.

9 MR. FITZGERALD: Judge, is there any way I can make
10 copies of this? The Clerk's office is
11 closed.

12 THE COURT: Do you have a copy machine in your
13 office?

14 MR. PARRY: Certainly.

16 (Recess taken at 5:24 p.m.)

20 * * * * *

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1 PROCEEDINGS: June 10, 1977, 9:20 a.m.
2 APPEARANCES: RICHARD J. ARCARA, United States Attorney,
3 by DENNIS O'KEEFE, Attorney, United
4 States Department of Justice.
5 SAPERSTON, DAY & RADLER, Attorneys for
6 the Defendant; WARREN S. RADLER, Esq.,
7 and BRIAN P. FITZGERALD, Esq., of Counsel.

8 THE COURT: We have an added case here. That is
9 United States of America against Merchant
10 Diamond Group, Miscellaneous Criminal
11 214. Mr. Radler and Mr. Fitzgerald are
12 here for Merchant Diamond and Mr. O'Keefe
13 for the Government.

14 MR. RADLER: Your Honor, may I just submit a
15 very short memoranda?

16 THE COURT: Yes.

17 MR. RADLER: It is only two and a half pages.
18 It deals solely with the question of your
19 Honor's discretion to order a hearing in
20 the event there is some evidenciary
21 question. There is some Second Circuit
22 law and I think it speaks for itself.

23 THE COURT: Mr. O'Keefe, I know that this is not
24 your matter and it is something that has
25 been handled by somebody else in your
office but I think the one thing I always

1 appreciate from you is a very candid way
2 you state the Government's position and
3 looking at your response it seems to me
4 that it is skimpy, to say the least. You
5 would agree with that, I suppose.

6 MR. O'KEEFE:

Well, your Honor, like you say I had
7 some problems. We got this late Wednesday
8 afternoon. George Parry has been running
9 this investigation which has gone on over
10 some months. He is in Atlanta. I origi-
11 nally asked for a postponement until he
12 could handle it on Monday or Tuesday
13 which the Court refused, so I have done
14 the best I could within the limited period
15 of time.

16 THE COURT:

Yes. The trouble is that you have
17 substantial amounts of property. Mr.
18 Radler, we have the papers here but why
19 don't you state briefly for the record
20 where we are.

21 MR. RADLER:

All right, sir.

22 THE COURT:

And why you believe you are entitled
23 to relief and if not immediate relief,
24 what do you foresee, what kind of a
25 hearing we should have and what kind of

testimony we should have.

MR. RADLER:

All right, sir. I won't get into, -
your Honor has the papers. There is
really not much point in describing the
operation of the company except to say
very briefly that they are in the business
of selling diamonds for investment. They
do it openly and publicly. It is a
recognized business all around the country.
There is nothing covert. They are not
gamblers. This isn't contraband property
we are talking about. It is diamonds
which are sold to customers for investment
with publicly-printed brochures using
telephone lists obtained from Dunn &
Bradstreet. They have an operation, -
or they did have an operation in Buffalo
until the Government essentially closed
them down which is really the basis for
our application at the Statler Hilton, -
they had offices there where diamonds
were sent across the border, declared at
Customs and in spite of the fact that the
affidavit upon which your Honor issued
the search and seizure warrants spends

1 five or six pages talking about their
2 activities going across the border, the
3 simple fact is that all that demonstrates
4 is that they were open, noncovert activities.
5 In any event, they have been doing
6 business in Buffalo since the fall of
7 1976 and they maintain bank accounts and
8 safe deposit boxes at the Marine Midland
9 Bank in the Statler Hilton office.

10 On April 13th and 14th pursuant to
11 search and seizure warrants issued by this
12 Court and by Judge Heffron over at County
13 Court of Erie County I think in the
14 absence of your Honor at one point the
15 bank account of our client in the sum of
16 approximately \$400,000 and diamonds that
17 were in the client's safe deposit vault
18 were seized for a value of about a hundred
19 thousand dollars so the Government has in
20 its possession assets of this company
21 worth approximately a half million dollars.

22 Since that time, and I say this so
23 you understand where we are procedurally
24 and why we believe there is some urgency
25 here, since that time there has been no

1 presentment we are aware of to the grand
2 jury; no indictments have been issued;
3 no arrests have been made of anybody,
4 the corporations, its officers or any of
5 its employees, but the practical net
6 effect of all of this has been to put our
7 clients right out of business without any
8 substantial prosecutorial expense. They
9 are out, they are finished here in Buffalo
10 because all of their assets are frozen,
11 seized or tied up in some fashion, so we
12 bring this application under Rule 41(e)
13 to return the property and implicit in
14 that, although I suppose we are not as
15 careful as we should have been, we are
16 asking essentially that the Court's
17 order which froze the bank account, because
18 that really is a substantial part of the
19 assets, either be vacated or not be
20 extended because the present order which,
21 incidentally, was secured ex parte by the
22 Government after we had appeared in the
23 case extended the original order freezing
24 the bank accounts until either this
25 Sunday or this Monday, depending on how

1 you count on the calendar, and it is our
2 position that in the first instance there
3 should be no more ex parte applications
4 of that sort.

5 THE COURT:

I certainly agree and of course,
6 what has happened in the past we cannot
7 do anything about.

8 MR. RADLER:

No; I understand that.

9 THE COURT:

Mr. O'Keefe, certainly when the
10 application was made to Judge Elfvin for
11 an extension and certainly there should
12 have been notice to the attorneys here.
13 There would have been nothing lost to
14 the Government by making the application
15 because you knew well in advance that
16 this extension was needed. At any rate,
17 here we are.

18 MR. RADLER:

Procedurally what we ask here is a
19 return of the property and I am asking,
20 I suppose, prospectively as of either
21 Sunday or Monday that this Court not
22 issue an additional extension. The basis
23 for the motion, and this is the crux of
24 our legal position, is that in the first
25 instance the search and seizure warrants

1 and the order which freezes this very
2 substantial bank account being essentially
3 the life of the company was issued based
4 upon an affidavit of Postal Inspector
5 Ronald Snyder which we believe, and we
6 say this respectfully but firmly, to be
7 incorrect and, frankly, replete with
8 misrepresentations. At the very least
9 we say that the affidavit of Mr. Snyder
10 coupled with Mr. Fitzgerald's affidavit
11 who has been in Toronto and reviewed all
12 of the records of these clients and makes
13 his affidavit on personal knowledge, and
14 then, frankly, taken with the answering
15 affidavit submitted here by Mr. O'Keefe
16 in response to ours, and this, frankly,
17 our alternative position, at the very
18 least we are entitled to a hearing under
19 Rule 41 to determine that the evidence
20 that was presented in support of the
21 applications for search and seizure
22 warrants indeed is not contradictory.
23 We believe it to be incorrect.

24 Essentially the affidavit of Postal
25 Inspector Snyder is based entirely on

1 hearsay information and I recognize that
2 that is not inappropriate in a search and
3 seizure warrant but it may be questioned
4 in an application for return of property
5 under 41(e) which is what we are saying
6 while the warrant in the first instant
7 was based upon hearsay. That may not be
8 incorrect if subsequently it is discovered
9 the hearsay information is incorrect
10 then we should have an opportunity to
11 challenge it and it is based entirely on
12 a Corporal Kossatz of the Royal Canadian
13 Mounted Police who is, - which is running
14 an investigation of the diamond business
15 in Toronto and there is no secret that
16 certain principals of our client have
17 indeed been arrested and arrested only in
18 Canada, but I really fail to see the
19 relevance of that in an application for
20 return of property which is part of the
21 argument being made here by the Government.
22 In any event, the argument set forth in
23 the Snyder affidavit upon which your
24 Honor issued the search and seizure
25 warrants really is four fold. I would

1 just like to touch on it very briefly to
2 show your Honor where at least if it is
3 not inaccurate, it is certainly at logger-
4 heads, to use the Government's words, with
5 some of the positions that we take.

6 They claim that there are four mis-
7 representations being made by our clients
8 in the sale of these diamonds to the
9 public for investment. They claim, "A",
10 that we are misrepresenting when we say
11 that the diamonds appreciate at a rate of
12 thirty-three to sixty per cent. Well,
13 we have attached here public articles
14 showing the dramatic appreciation rate
15 in diamonds. We have attached copies of
16 invoices showing what we paid. That is,
17 our clients, for these diamonds, showing
18 that the appreciation rate in many
19 instances exceeds sixty per cent.

20 The Government's response to our
21 motion states that while there seems to
22 be some discrepancy as to the appreciation
23 in values of diamonds on the wholesale
24 market whether or not diamonds in the hands
25 of ordinary citizens appreciate substantially

1 depends on the quality of the diamonds
2 and then they acknowledge here the two
3 experts; namely our appraiser, Mr.
4 Calderia and Mr. Arend, their expert who,
5 incidentally, is a former employee of
6 ours, and we can get into that if the
7 Government cares as to why he is now
8 their expert.

9 THE COURT:

Mr. O'Keefe, you better have
10 somebody else in addition to the man who
11 was the former employee of Merchant
12 Diamond. You better have somebody else
13 in here to look at these diamonds. It
14 certainly seems to me, I do not want
15 to hear any argument about it now, but
16 go ahead.

17 MR. RADLER:

I point out the first point is that
18 we are misrepresenting as to appreciation
19 and then in their response they say that
20 our appraiser and their expert are at
21 loggerheads and there is no counter to
22 the invoices showing what we paid for
23 them or the articles in Forbes and in
24 Business Week and U. S. News and Business
25 World, all of which we have attached to

1 our papers.

2 Frankly, it is public knowledge not
3 only in the field but in business that
4 diamonds have indeed appreciated at a
5 very substantial rate and we say that if
6 that is one of the bases on which this
7 search and seizure warrant was issued,
8 that that search and seizure warrant at
9 least as to that problem must fail or at
10 the very worst we are entitled to an
11 evidenciary hearing on the whole question
12 as to how this man makes the representa-
13 tions to the Court that he did to obtain
14 a search and seizure warrant and tie up
15 a half million dollars worth of assets
16 and puts us out of business. This isn't
17 heroin. These are funds from, we claim,
18 a legitimate business. They are not
19 contraband. They are perfectly legitimate
20 articles of commerce. That is their
21 first position.

22 Secondly, they argue that we mis-
23 represent with respect to the availability
24 of a ready market and the fact that
25 Merchant Diamond Group will buy back the

1 diamonds at prevailing retail prices.
2 There is no question and I don't think
3 there has been, - incidentally, they say
4 they will play for the Court tape
5 recordings of disgruntled customers. I
6 would certainly invite that if the Court
7 indeed orders an evidenciary hearing. We
8 would like to hear the nature of the
9 complaints that we are talking about
10 because it has been the policy of our --

11 THE COURT:

Mr. Radler, we can make arrangements.
12 The best way to do that, if you have the
13 tapes of conversations of disgruntled
14 customers and you believe we should listen
15 to at a hearing, you play them to Mr.
16 Radler or Mr. Fitzgerald beforehand.

17 MR. O'KEEFE:

We can make those arrangements, your
18 Honor.

19 THE COURT:

Fine.

20 MR. RADLER:

I would only say that, - and we
21 argued this in our papers or presented it,
22 the Court should appreciate and I am not
23 sure how much weight it has here, but
24 since they are telling us about arrests
25 in Canada, there is a Canadian statute

1 which prohibits, set forth by citation
2 in our affidavit, which prohibits the
3 use of information obtained through
4 electronic surveillance outside of
5 Canada. It is set forth in our papers.

6 We claim that what they have done
7 here is a violation of Canadian law and
8 that ultimately if we were to go to a
9 substantive trial in this case that that
10 evidence would not be admissible in this
11 Court. However, so long as they have it
12 and if they intend to rely on it, if the
13 Court permits it, we would certainly
14 welcome the opportunity to hear it.

15 We claim that what happens, and we
16 have set it forth in our papers, we don't
17 guarantee we will buy back diamonds but
18 in any transaction, whether you buy a new
19 car or a suit of clothes, people are going
20 to be unhappy and our policy has been to
21 assist customers in reselling diamonds
22 or we will buy them back at four per cent.
23 In not one instance has a customer lost
24 money on the sale. That is, on the sale
25 back, and I challenge the Government to

1 show us one instance in which a customer
2 who has said that they have been dis-
3 gruntled, and there have been some, has
4 ever lost money on the proposition. I
5 don't know what is illegal about that kind
6 of activity.

7 The fourth representation is that
8 we make misrepresentations with respect
9 to our independent gemologist, Mr.
10 Calderia. See, what happens is our
11 client buys the diamonds on the Inter-
12 national Diamond Exchange in Holland and
13 Belgium, the most legitimate places in
14 the world to buy diamonds and they are
15 appraised in Toronto by an independent
16 gemologist who then seals them in little
17 glass containers with his stamp so that
18 they have not been tampered with between
19 the time of the appraisal and the time
20 they are ultimately sold to customers.
21 Our gemologist indeed has been certified
22 as taking the course in diamond grading
23 and quality by the Gemological Institute
24 of America. They claim that he is not
25 a member of the Gemological Institute of

1 America. We have contacted the Gemological
2 Institute of America and I think I am
3 staying within the confines of our
4 affidavit, you can't be a member of the
5 Gemological Institute of America. There
6 is no such thing. All you can do is pass
7 the tests and our man has passed the
8 test and we are prepared to present a
9 copy of his certificate, but in any event,
10 if that is a misrepresentation that would
11 permit this Court to tie up \$500,000
12 worth of assets, I think it would indeed
13 be kind of a skimpy position for the
14 Government to be taking.

15 There are a couple of other points
16 I would like to make very briefly and
17 then I will sit down. We would really
18 like to take issue with a couple of
19 contentions in the Government's original
20 application and in their response to us.
21 It is their position that we misrepresent
22 the diamonds because they are of widely
23 varying quality. In fact, they are not.
24 This is set forth both in the papers and
25 in the exhibits. All of the diamonds

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1 which we sell are within one range,
2 VVS-1 or VVS-2 and we have set forth the
3 various ranges in diamonds. It is the
4 second highest kind of diamond that you
5 can purchase, the highest being flawless
6 which are just really out of the range
7 of anybody except, for instance, Grace
8 and Prince Ranier, for all practical
9 matter. These are the kind of things I
10 would hope someday maybe I could afford
11 for my wife and there is really nothing
12 widely varying about them at all. All
13 of the affidavits that they are submitting
14 including, with all due respect, Mr.
15 O'Keefe's affidavit, just conclusions.
16 We have set forth to the Court and we
17 think in detailed fashion facts. The
18 Government has not met its burden, at
19 least at this juncture, to refute these
20 facts because I think we have dealt with
21 the varying quality argument, the whole
22 question of resale, the question of the
23 fact somebody may have been arrested
24 years ago, - one of our principals, -
25 and pled guilty to a violation of

1 Canadian law I submit is not appropriate
2 evidence to be submitted to this Court
3 in support of a search and seizure
4 warrant and their fourth point with
5 respect to appreciation I also submit
6 is refuted by the facts set forth in
7 our affidavit so that while I recognize
8 that the relief is somewhat unusual, it
9 is called for by the Federal Rules,
10 permitted under Rule 41(e). It is not,
11 incidentally, as might be gathered by a
12 failure on our part to correct the
13 heading in the affidavit. This is not a
14 motion for the suppression of evidence,
15 incidentally. I am sorry we had that.
16 It was initially felt we would join it
17 but I want the record to be very clear
18 it is merely an application under Rule 41(e)
19 for the return of our property which we
20 claim is being held pursuant to a search
21 and seizure warrant based upon incorrect
22 information and it is our argument against
23 another extension of the freeze order and
24 we respectfully submit that this Court
25 should issue an order freeing this

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1 property and should not issue additional
2 orders with respect to the freeze of the
3 assets.

4 Alternatively, and I don't really
5 think it is necessary because I don't
6 think they have met their burden here,
7 but if the Court thinks that there are
8 facts the statute itself under 41(e)
9 permits an evidenciary hearing and
10 because I know the time constraints of
11 this Court I think it would be permissible
12 if necessary, if the Court feels that a
13 hearing is required under the Magistrate's
14 Act, I think the Magistrate would be
15 entitled or permitted to hear evidence
16 on this as well.

17 THE COURT:

At the hearing it would seem to me
18 from listening, Mr. Radler, that you
19 would have your expert or experts here?

20 MR. RADLER:

21 Well, we would like to do several
22 things at the hearing. We would like the
23 opportunity to examine Postal Inspector
24 Snyder upon whose affidavit this Court
25 and Judge Heffron issued the search and
seizure warrant and the freeze order and

1 we would also produce evidenciary
2 information in the way of expert testimony
3 and perhaps, - perhaps, because I
4 recognize there is the possibility of
5 an indictment here, - perhaps the
6 principals or employees of the company
7 with respect to their operations and the
8 alleged misrepresentations, although I
9 don't want to represent to the Court that
10 I will do that. I would certainly
11 contemplate having expert testimony.

12 THE COURT:

13 It would seem that the burden
14 continues to remain certainly upon the
15 Government in this kind of a procedure.
16 Mr. O'Keefe, it has been some time here
17 has gone by. As far as your position is
18 concerned, this is the first, at least
19 I have heard, and when we had the
20 application here from Mr. Fitzgerald and
21 initially there was an argument here
22 that this freeze should not be in place.
23 However, in order to give the Government
24 time to make their investigation because
25 I believe that the papers that were
submitted warranted that kind of an

1 opportunity; I denied application of
2 Merchant Diamond for the return of their
3 property and permitted, - gave you an
4 opportunity to run your investigation
5 but you have had some time now so I
6 think we must certainly at the very least
7 have a hearing.

8 MR. O'KEEFE:

Yes, your Honor.

9 THE COURT:

10 And have it promptly. That means
11 Mr. Parry, you tell him to drop whatever
12 he is doing and get in here so we can
13 have the hearing. It might also mean
14 that if there are tag ends of this
15 investigation that have to be put together,
16 then you better free up some people from
17 other enterprises and put them to work
18 on this, because I think now that the
19 amounts involved here are certainly
20 considerable. The impact on the company
21 no doubt is, - well, if it is not
22 disastrous already, it certainly is a
23 terrible burden. Whatever happens here,
24 the damage to reputation certainly will
25 be something that they will have to fight
with for a long, long time, so we are

1 going to have a very quick hearing. I
2 think that the best way to have the
3 hearing would be for the Court to run
4 the hearing. I may not be able to do
5 that and therefore then we would have the
6 Magistrate do it because I think he can
7 do it, but since the initial affidavit
8 and order here were made here and the
9 other orders were made either by Judge
10 Heffron or by Judge Elfvin, I would think
11 that it probably would be best to keep
12 it at the District Court level. I am
13 thinking of beginning the hearing, let
14 us say, next Wednesday afternoon or next
15 Thursday.

16 MR. O'KEEFE:

Okay, your Honor.

17 THE COURT:

18 In the meantime you say you have
19 some tapes. I think there is one thing
20 that we must resolve here very quickly.
21 When I signed these applications, in it it
22 is clear that some of the information
23 that came to the Government came through
24 a Canadian electronic surveillance. The
25 representation was made to the Court at
that time when I had some questions about

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1 it that the applications were made in
2 accordance with Canadian law and the
3 use of the applications here in this
4 court would be in accordance with the
5 law and I accepted your representation
6 made then. I had no reason not to do
7 so. Now we have Mr. Radler's explanation
8 that the use of these materials outside
9 of Canada would be contrary to Canadian
10 law. If this is the case, this is a
11 legal problem which we must face up to
12 immediately.

13 MR. O'KEEFE:

Your Honor, is that what he said?

14 THE COURT:

That is what he told me.

15 MR. RADLER:

16 Yes, I am saying that, and I would
17 ask for the Court's indulgence for Mr.
18 Fitzgerald to present our position here
19 because he has researched it and
20 discussed it with Canadian counsel and
21 I believe the Government's counsel in
22 Canada and just for the record so the
23 reference is clear on Page 14 of Mr.
24 Fitzgerald's affidavit it is stated in
25 the footnote the disclosure of the RCMP
wiretap information which they claim is

1 pursuant to court-authorized electronic
2 surveillance, and I don't disagree with
3 that, by the way. It was authorized in
4 Canada, is in violation of the Canadian
5 Privacy Protection Act, the citation being
6 Snow's Criminal Code, Section 178.1 and
7 following, and might I ask Mr. Fitzgerald
8 to present our position to your Honor.

9 THE COURT:

I think right now mostly for Mr.
10 O'Keefe's benefit because if Mr. Fitzgerald
11 is right I do not know how we will
12 decide this because if it is a violation
13 of Canadian Law, you may still be able to
14 argue we can use it here. I do not know.

15 MR. RADLER:

My point at this stage it may be
16 that everybody ought to listen to it, but
17 if it goes further, we would certainly
18 take the position that it is inadmissible.
19 I don't want it to be construed as waiving
20 any rights with respect to it, but I
21 think if your Honor would listen for just
22 a moment.

23 MR. FITZGERALD:

Your Honor, just simply there is a
24 Canadian Act here called the Protection
25 of Privacy Act. It is Section 178 of

1 Snow's Criminal Code and it simply says
2 that it is illegal for the Government in
3 Canada to use the proceeds or evidence
4 of electronic surveillance and to disclose
5 that information to anybody except for
6 use in a civil or criminal proceeding.

7 MR. RADLER: In Canada.

8 MR. FITZGERALD: The statute itself doesn't say in
9 Canada but we have an affidavit of
10 Theodore Burns that was used as a basis
11 to get letters rogatory from the Department
12 of Justice in Canada, letters rogatory
13 answers, that is, and he had to proceed
14 by way of letters rogatory because he
15 could not get wiretap information from
16 the Department of Justice up there and
17 his affidavit sets forth that the
18 Canadian Department of Justice told him
19 it would be illegal for them to disclose
20 that wiretap information so we have the
21 statute itself. We also have that
22 affidavit.

23 THE COURT: It is the opinion of the law enforce-
24 ment officials in Ontario.

25 MR. FITZGERALD: Yes, it is, your Honor, and also we

1 have an attorney who is assisting us up
2 there, up in Canada, who is a former
3 prosecutor for the Department of
4 Justice up there and he informs us that
5 is his understanding of the statute
6 also.

7 THE COURT:

8 Mr. O'Keefe, we have the problem of, -
9 I think the Postal Inspector should be
10 here. Your expert should be here. If
11 your expert, as Mr. Radler has explained
12 it, was a former employee of Merchant
13 Diamond and now he is in here saying,
14 "They did this and they did that and the
15 material here was not all it was cracked
16 up to be", a few minutes ago you were
17 talking about disgruntled customers.
18 This many times smacks of testimony of a
19 former disgruntled employee. I do not
20 know whether he is or is not. I think
21 what you better do, though, is get some
22 fellow independent, independent reputation
23 in this field, somebody that everyone
24 can say that his judgment is a fair and
25 good one, not somebody who runs a shop in
a basement somewhere but somebody who is

1 known as an expert in this field and I
2 think we ought to clear this up at as
3 early a stage as possible. In the
4 meantime we do have the freeze problem.

5 MR. O'KEEFE: Right.

6 THE COURT: I will make an extension of that.

7 MR. O'KEEFE: Your Honor, I brought an order over
8 yesterday which would extend the freeze
9 to the 17th which I believe is next
10 Friday and would give us time to hold a
11 hearing.

12 THE COURT: I have it here, I believe. You
13 brought over some other orders, Mr.
14 O'Keefe.

15 MR. O'KEEFE: That had to do with another matter.

16 THE COURT: You have given me so many orders.
17 Is it in the folder here? I will extend
18 the freeze of the assets until June 17th.

19 MR. RADLER: Okay.

20 THE COURT: We will set the time of the
21 beginning of the hearing to be at 2:00
22 o'clock on Wednesday, June the 15th.

23 MR. O'KEEFE: Okay, your Honor.

24 MR. RADLER: 2:00 o'clock Wednesday, okay. Your
25 Honor --

1 THE COURT:

Yes.

2 MR. RADLER:

Could I just comment on one thing.

3

That is the question of a new independent

4

expert. I think maybe I haven't made my

5

position clear.

6 THE COURT:

I mean as far as the application

7

itself.

8 MR. RADLER:

Well, what I am saying is this

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hearing is premised upon the original

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search and seizure warrant. That is

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really what I am trying to say and that

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search and seizure warrant is based only

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on Arend. I don't think the Government

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should now be permitted to come back with,-

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they are going to have to live with

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Arend, I respectfully submit. That was

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the basis upon which they represented to

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the Court that it ought to issue the

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search and seizure warrants. For them

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now to try to repair that damage after

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the fact, that ~~may~~ be proper at a trial

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but we are talking only about the issuance

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of the search and seizure warrants.

24 THE COURT:

I will not rule on it now. They

25

have an argument and I will not rule now

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WESTERN DISTRICT OF NEW YORK

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1 but certainly the original expert should
2 be available.

3 MR. RADLER: Oh, yes. I would like to examine
4 Mr. Arend.

5 THE COURT: Whether or not we will limit it to
6 his testimony depends on what occurs.

7 MR. RADLER: All right, sir.

8 THE COURT: You get ready, Mr. O'Keefe.

9 MR. O'KEEFE: All right, your Honor.

10 THE COURT: Will you check with Mr. Hellerer.
11 I know that order is about. It may be
12 on my desk.

13 MR. RADLER: Thank you, your Honor. June 15th
14 at 2:00 here.

15 THE COURT: June 15th at 2:00.

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17 (Recess taken at 9:50 a.m.)

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1 PROCEEDINGS:

June 15, 1977, 2:20 p.m.

2 APPEARANCES:

RICHARD J. ARCARA, United States Attorney,
by L. GEORGE PARRY, Attorney, United
States Department of Justice.

4

SAPERSTON, DAY & RADLER, Attorneys for
the Defendant; WARREN S. RADLER, Esq.,
and BRIAN F. FITZGERALD, Esq., of Counsel.

6

7 THE COURT:

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We are here for a hearing. This is
entitled United States against Merchant
Diamond Group, Incorporated,
Miscellaneous Criminal 214, on the
application of the corporation pursuant
to Rule 41 for the return of certain
merchandise and moneys which are
described in the application.

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15 MR. RADLER:

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Your Honor, might I make a very
brief opening statement before we
proceed to whatever evidentiary proof
you permit. This is an application
under Rule 41(e) for the return of our
property. Of course, it perhaps goes
without saying, but I want to say it
so the record is clear, in the event
that we are not successful in the return
of the property, we are, of course, not
waiving our right to renew the motion

1 should an indictment be returned here
2 because, as the Court knows, there have
3 been no arrests of any of our employees
4 or of the company, nor any indictments.

5 THE COURT:

Mr. Radler, I hope you do not mean
that we will do this twice.

6
7 MR. RADLER:

No.

8 THE COURT:

Whatever the record is here,
9 perhaps the record ought to be supple-
10 mented at a later date, but I would
11 think in your interest and at least in
12 my interest in trying to take care of
13 everything that comes in here if there
14 is a renewal of such a motion that we
15 also would consider whatever evidence
16 we hear on this application.

17 MR. RADLER:

I am not asking for two bites of
18 the apple. I only want to make it
19 clear in the terms of making any addi-
20 tional motions with supplementary
21 material or whatever may be discovered
22 subsequent to any possible indictment.
23 We are not waiving our right to make
24 it. I thought I should make that clear.
25 Also something that perhaps ought

1 to be cleared up, as I understand the
2 nature of the proof and the nature of
3 this motion, what we are seeking here
4 is return of our property because it is
5 our position that the search and seizure
6 is unlawful and that it was based upon
7 material which is illegal and that the
8 papers presented to this Court and the
9 representations made to this Court by
10 the Special United States Attorney for
11 the Strike Force are incorrect and we
12 are challenging the sufficiency of the
13 original underlying papers upon which
14 the search warrant was issued. That is
15 the purpose of this application.

16 I say that because I was advised outside
17 by Mr. Parry that he is bringing or he
18 intends to bring an expert from New York
19 City on the question of the appreciation
20 rate of diamonds which is one of the
21 contentions before this Court. It is my
22 position that they have stated their
23 case in the papers, before this Court
24 at the time it signed the search warrant
25 and we shouldn't be litigating de novo

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that question.

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THE COURT:

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I am not going to rule on admissibility of evidence now. I am going to begin to listen to the testimony and when the problem comes up, then I will rule on it. I am not going to rule on it ahead of time.

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MR. RADLER:

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All right, sir. I raise it because I discussed it with Mr. Parry out in the hall. Before I call our first witness, I would like to apprise the Court of our initial position here, namely, that the Court should return our property because the entire affidavit of Postal Inspector Snyder is based upon information obtained by the Royal Canadian Mounted Police by virtue of electronic surveillance, wire-taps in Canada and that it is the Canadian Law that the disclosure of such information for any purpose outside of the exceptions stated in the statute in Canada is illegal and, in fact, is an indictable offense and we intend to call as our first witness, expert testimony from Canada to that effect and that's a

1 preamble to our first witness, your
2 Honor. That is the purpose of the
3 testimony which we expect to present
4 through Mr. Powell, formerly with the
5 Ontario Department of Justice who is
6 responsible for the statute here in
7 question. I say that so there is some
8 order to the hearing and so that you will
9 understand we are not into the affidavit's
10 merits, but rather the fact the repre-
11 sentations as we understand it made to
12 this Court at the time it issued the
13 search and seizure warrant, at the time
14 it issued the order freezing the property
15 that there was nothing unlawful about
16 the information that was disclosed to
17 the postal inspector. We say that what
18 was done here is an indictable offense
19 and that it is, indeed, unlawful and
20 toward that end, I will call for our
21 first witness, Mr. Clay Powell.

22
23 C L A Y P O W E L L (390 Bay Street, Toronto, Ontario,
24 Canada), a witness called by and in behalf of the defendant,
25 having been first duly sworn, was examined and testified as

1 follows:

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3 DIRECT EXAMINATION BY MR. RADLER:

4 Q Mr. Powell, you are a barrister and solicitor duly
5 licensed to practice in Canada and in the Province of
6 Ontario, is that correct?

7 A Yes. Specifically in the Province of Ontario. We are
8 lawyers in Canada for a specific province, yes.

9 Q Are you also a Queen's counsel?

10 A Yes, I am, sir.

11 Q And could you explain to the Court what that designation
12 means?

13 A Queen's counsel are commonly referred to as "Q.C.",
14 is a designation, an honorary designation which is
15 inferred on a certain number of lawyers each year by
16 the respective Attorney's General of the Province on
17 behalf of the Queen and is supposed to signify, and I
18 hope it does, recognition of work before the bar.

19 Q Would you tell us something about your educational
20 background commencing with your college experience?

21 A Yes. I attended the University of Western Ontario
22 in London, Ontario, and obtained a Bachelor of Arts
23 Degree in 1958 and I then went to Osgood Hall Law
24 School in the City of Toronto and I graduated from
25 Osgood Hall in 1961. Following graduation from law

1 school, it is necessary in Ontario that you article
2 with a lawyer for a period of approximately a year and
3 a half before attending to write your bar exams and
4 during that year and a half period, I articulated in
5 Toronto with the firm of Martin and Hard which was a
6 totally criminal law firm. Both, - Mr. Martin is now
7 a judge of the Ontario Court of Appeals and Mr. Patrick
8 Hard is a judge of the High Court of Justice of
9 Ontario now.

10 Q Thank you. Mr. Powell, after your article at Martin
11 and Hard, what did you do then?

12 A Then we attend the bar admission exams which is a
13 six month course and which I successfully completed
14 and then I joined the Department of the Attorney
15 General for the Province of Ontario, specifically to
16 work in the area of criminal law.

17 Q Can you tell me, in your tenure in the Department of
18 the Attorney General of the Province of Ontario?

19 A Yes. I went there in February, 1973 and I remained
20 until last September.

21 Q Do you mean in the year '63 or '73?

22 A '63, I am sorry, until last September.

23 Q And would you tell us what you first did at the
24 Department of the Attorney General?

25 A I was working in an area, if I must just take one

1 moment to explain, your Honor, the system in Canada
2 is such that the criminal law is passed by the Federal
3 Government in Ottawa, but is enforced by each of the
4 provinces and each provincial Attorney General is
5 responsible for the enforcement of the criminal law
6 within his province. I worked in the head office of
7 the Attorney General and within a year of joining that
8 department, was then responsible for all criminal
9 appeals in the province and motions by way of
10 prerogative writ that were held in the Superior Courts
11 and that related to all criminal activities throughout
12 Ontario. It was followed into the head office.

13 Q And in our discussions and preparation for your
14 testimony, I think you told us that in 1967, a new
15 appointment was given to you?

16 A Yes. In '67, I was named Senior Crown Counsel in
17 charge of what was a newly created branch within the
18 Department of the Attorney General, essentially
19 called the Special Prosecutions Branch. My responsi-
20 bility remained insofar as criminal appeals were
21 concerned, but expanded somewhat into an area that was
22 newly created, called Special Prosecutions.

23 Q What was the purpose of the Special Prosecutions Branch?

24 A It followed two things that really happened. In
25 '65, the collapse of Atlantic Acceptance Corporation

1 to the tune of about a hundred twenty million dollars,
2 it brought on to show how inadequately we were prepared
3 to properly prosecute major criminal matters and also
4 there was an increasing concern for infiltration of
5 organized crime activity within the Province of Ontario
6 and it was thought that the ordinary Crown Attorney
7 System as it operated throughout the Province was not
8 really geared to handle matters that crossed over
9 county or district lines and we created an office,
10 therefore, that had province-wide jurisdiction.

11 Q What did you do after that?

12 A Well, we worked, - immediately when I started with the
13 department, I was Department 1 which means department
14 head and we then started in to recruiting people. At
15 that point in time, there were approximately fifteen
16 lawyers who were under my direction in that area and
17 that continued on really, until 1972, at which time I
18 was made Assistant Deputy Attorney General for Ontario
19 in charge of really, the whole criminal law program
20 in the Province which greatly expanded my administrative
21 responsibilities.

22 Q How many lawyers did you administer at that time?

23 A At that time, it became very large because it took in
24 all the Crown Attorneys and Assistant Crown Attorneys
25 in the Province so it expanded to approximately two

1 hundred full-time attorneys engaged in criminal
2 prosecutions.

3 Q Now, Mr. Powell, are you familiar with a Canadian
4 statute known as the Invasion of Privacy Act?

5 A I am very familiar with that particular statute, yes.

6 Q And can you tell us why it is, or how it is that you
7 are very familiar with the Canadian Invasion of
8 Privacy Act.

9 A Well, first of all, the actual act itself when it was
10 first brought into Parliament in Ottawa was called
11 the Protection of Privacy Act. It was set up as a
12 series of amendments to be contained in the Criminal
13 Code and it was introduced for the first time in
14 1972. It actually passed in '73 to come into effect
15 in mid-summer of 1974 as amendments to the Criminal
16 Code. This was the first time in Canadian history
17 that there was any legislation to deal with the control
18 of wiretapping or invasion of privacy by electronic
19 means and accordingly, in Ontario, the Attorney
20 General felt and so directed me that he, as the person
21 responsible for criminal law in Ontario, wanted to
22 insure that that statute was given very, very
23 consideration and every policeman or prosecutor in
24 Ontario knew exactly what it meant. Therefore,
25 starting in 1974, we commenced a series of lectures,

1 or I did, throughout Ontario to various police officers
2 and we set up a procedure whereby once the law went into
3 effect in the summer of '74, every wiretap application
4 that was brought or granted in the Province of Ontario
5 would be approved by myself. I had just one exception
6 to that in relation to some narcotics matters, but
7 basically anything to do with the criminal law became
8 my responsibility and it was made clear to me that the
9 Attorney General was holding me responsible for the
10 enforcement of that statute and to make certain it
11 remains within bounds. I should add also that the
12 statute provided that the Attorney General must, each
13 year, make public, a report as to exactly how many
14 wiretaps are done, what offenses are involved, how many
15 people are arrested and therefore, he has a very vital
16 interest as the person politically responsible for the
17 enforcement of that section.

18 Q Did you continue to administer that statute and to be
19 responsible for its enforcement until the termination
20 of your employment at the, - what I would call the
21 Justice Department during that period, the Ontario
22 Justice Department?

23 A Yes. I prefer to refer to it as the Attorney General's
24 Department only because we do get into a conflict if
25 we talk about the Justice Department, which is the

1 Federal Department and this has some bearing, a later
2 matter here, but yes, I did, up until the end of
3 August when I decided that at the age of forty, it was
4 time to do something different.

5 Q All right, sir. Now, does the statute to which you
6 have reference, namely, the Canadian Invasion of
7 Privacy Act, have a citation or designation?

8 A Well, it is contained as part of the Criminal Code
9 of Canada, which is the Federal Criminal Code which
10 has been in effect since 1892, with subsequent
11 amendments, but contains all the criminal law of
12 Canada and it is just one part of that Code.

13 Q All right. Have you brought with you today a copy
14 of the Martins Annual Criminal Code bearing 1976
15 with amendments and supplements?

16 A Yes, I have brought a copy of that and I should say
17 while it says "Martins Annual Criminal Code", in
18 Canada, there are unannotated statutes that are
19 available in the library unmarked. I have one of
20 Martins. I might add, your Honor, I believe that
21 every judge in Canada uses this same particular
22 criminal code for their purposes and I believe it
23 to be, and I know it to be an accurate copy of the
24 Criminal Code of Canada.

25 MR. RADLER:

May I have this marked for

1 identification.

2 THE COURT: Yes.

3
4 (Defendant's Exhibit Number 1
5 marked for identification.)

6
7 THE COURT: Martins is the unofficial reporter
8 similar to McKinney's, is that it?

9
10 BY MR. RADLER:

11 Q Yes. I think it would bear, - that would be a good
12 analogy, yes. It is really our McKinney's containing
13 the criminal code. I show you Defendant's Exhibit 1
14 for identification, Mr. Powell. I ask you if that
15 is a copy of the Martins Annual Criminal Code, the
16 code that you have referred to?

17 A Yes, it is, sir.

18 Q And can you point out in this exhibit where the
19 Invasion of Privacy Statute is contained?

20 A Well, in this particular book it commences at Page
21 107. It is actually part 4.1 of the Criminal Code of
22 Canada and bears the designation "Invasion of Privacy".

23 Q Do you have with you for your own edification, a
24 copy of this?

25 A Yes, I do, sir.

1 MR. RADLER:

I would ask this be introduced in
evidence, if your Honor please.

2
3 THE COURT:

We will mark that and then
substitute the appropriate page copies.

4
5 MR. RADLER:

Yes, sir.

6

7

(Defendant's Exhibit Number 1
received in evidence.)

8
9

10 THE COURT:

Could I see that? Hand it to Mr.
White. I would think also, Mr. Radler,
so we can return to Mr. Powell, his
book that you show this to Mr. Parry.
We will certainly have Mr. Parry look at
it. It may be that the purpose might
be appropriate. Is there any official
table of this volume, Mr. Powell, that
you are aware of by the Ontario
Legislature or by the Court in any way?

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20 THE WITNESS:

Sir, I am not aware that there is
any, no, and I am sorry that I did not
bring, - actually, the Queen's Printer
Office in Toronto, yesterday, we were
unable to get an up-to-date official
copy of the Criminal Code with the

21

22

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24

25

1 amendments, the problem is the budget of
2 Canada is limited, some sort. It doesn't
3 put them out every year. I can only
4 say that I believe, from practical
5 experience, that I have that every judge
6 of the Court of Appeals, and indeed I
7 know in the Supreme Court of Canada and
8 the trial judges use Martins Criminal
9 Code and take it with them and I believe
10 it to be accurate in all phases.

11 BY MR. RADLER:

12 Q I suppose I might ask is that a true and accurate
13 copy of the actual statute that was passed and authorized
14 by the appropriate legislative body in Canada?

15 A To the best of my knowledge, it is an accurate copy,
16 yes.

17 THE COURT: Go ahead, can he follow along?

18 MR. RADLER: Yes, he has his own copy.

19 THE WITNESS: Page 107.

20 THE COURT: Does Mr. Parry have a copy?

21 MR. RADLER: Well, I can give Mr. Parry, with
22 the Court's permission, a photocopy of
23 the section which, with the Court's
24 permission, I will be glad to do.

25 THE COURT: Why not give me that and give Mr.

Parry the book.

BY MR. RADLER:

Q Fine. That will leave me without a copy, but I will look over the witness' shoulder. Could you tell us first, based upon your experience and your working with the statute and, indeed, your enforcement of that statute and based upon everything you have said here, what does the statute provide for in general terms, what is its purpose and what are its general provisions?

A Generally, the statute is based upon the Omnibus Crime Bill or Safe Streets Act of the United States. Not all the provisions of that Act are contained in the Code, but essentially, it is a scalping, if I can use that term, of the American Statute. Essentially, it creates an offense to unlawfully intercept private communications. It provides for a procedure whereby Court authorization may be obtained in relation to certain types of crimes to provide for interceptions. It, for the first time, contains a code of admissibility of evidence in Canada. The rule has always been, it doesn't matter how you get the evidence, but if the evidence is relevant and probative, it is admissible. We had no exclusionary rules until this statute came into effect and for the first time, we had, by the statute, rules that evidence would become inadmissible

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1 if the interceptions were unlawfully obtained and the
2 derivative evidence could be inadmissible, subject to
3 judicial discretion. It also contained offenses for
4 possession of certain types of devices designed to
5 surreptitiously intercept private communications. It
6 created an offense for disclosure of either the
7 existence of a wiretap or interception or the contents
8 thereof, set out that damages would be payable to a
9 person if they were improperly incepted in private
10 communication and provided for the reporting procedure
11 whereby each provincial Attorney General must report
12 to the people of his province.

13 Q Now, will you turn to Section 178.20 contained on
14 Pages 114 and 115 of the statute. Do you have that?

15 A Yes, I do.

16 Q And that's the section that I would like to direct
17 your attention to. Could you read that into the
18 record and read into the record in that connection,
19 the pertinent portions of that section?

20 A Yes. The section provides that "Where a private
21 communication has been intercepted by means of an
22 electromagnetic, acoustic, mechanical or other device
23 without the consent, express or implied, of the
24 originator thereof, or of the person intended by the
25 originator thereof to receive it, every person who,

1 without the expressed consent of the originator
2 thereof or of the person intended by the originator
3 thereof to receive it, willfully (a) uses or discloses
4 such private communication or any part thereof or the
5 substance, meaning or purport thereof or of any part
6 thereof, or (b) discloses the existence thereof, is
7 guilty of an indictable offense and liable to imprison-
8 ment for two years".

9 Q Are there some exclusions and exceptions to that?

10 A Yes, there are in Subsection 2, specifically provides
11 that there can be exceptions and it says "Subsection (1)
12 does not apply to a person who discloses a private
13 communication or any part thereof or the substance,
14 meaning or purport thereof - -"

15 Q Slow down for the reporter.

16 A I am sorry. "Or any part thereof or who discloses the
17 existence of a private communication", and then in
18 Subsection (a) it exempts it in relation to giving
19 evidence in any civil or criminal proceedings. That
20 is not the full wording, but that is the gist of it.
21 Subsection (b), "in the course of or for the purpose
22 of any criminal investigation, if the private
23 communication was lawfully intercepted", and then
24 (c) "in giving notice under", and they provide that
25 our law provides that notice must be given to every

1 person within 90 days who is the object of an inter-
2 ception, so that is the section. Under (d), "in the
3 course of the operation of a telephone" or that type
4 of thing, servicing of telephones, and (e), "where
5 disclosure is made to a peace officer and is intended
6 to be in the interests of the administration of justice."

7 Q Now, Mr. Powell, does that statute have any provisions
8 for extra territorial effect?

9 A The Canadian Criminal Code, since it was first enacted
10 in 1892 has always, to the best of my knowledge, and
11 in all the law that I am aware of, been interpreted
12 to relate to matters solely and only within Canada
13 unless otherwise specifically provided for in the
14 statute.

15 Q Is there any specific provision for the use of wiretap
16 material and information in this statute outside of
17 Canada?

18 A No, there is not.

19 Q I notice that there is an exception to the use of
20 such material contained in the statute, the exception
21 being applicable to peace officers.

22 A Yes.

23 Q Is there a description or designation of peace officers
24 in the statute?

25 A Yes. A peace officer is defined, - your Honor doesn't
have this in the photocopy, in Section 2 of the

1 criminal Code to include a great category of people
2 from mayors, wardens, reeves and sheriffs, justices
3 of the peace, employees of prisons, police officers
4 bailiffs and constables, and it goes on and it covers
5 a great category of people.

6 Q Does it apply to United States Postal Inspectors?

7 A No, sir, in my opinion it does not in any way.

8 Q Now, are you familiar with a case called United States
9 of America against Brower, and if your Honor will
10 permit me, I will tie this in with this problem.

11 Are you familiar with a case called United States of
12 America against Brower brought in this court?

13 THE COURT: That is B-r - -

14
15 BY MR. RADLER:

16 Q B-r-o-w-e-r. It is Criminal 76-33.

17 A Yes, I am very familiar with it.

18 THE COURT: That was the number here?

19
20 BY MR. RADLER:

21 Q Yes, sir, right in this court, brought by the United
22 States of America against Mr. Brower and Mr. Forbes.
23 In fact, one of the counsel is in the room.

24 A Yes, Mr. Doyle. I am familiar with the case.

25 Q All right. Now, what was your connection with that

1 case?

2 A I was retained last fall after going into private
3 practice by the United States Government to represent
4 the United States Government in Toronto to bring an
5 application before the Ontario Supreme Court for an
6 order to take commission evidence pursuant to a request
7 by way of letter rogatory that had been issued by
8 Judge Elfvin of this court.

9 Q And are you familiar with the background that required
10 you to attempt to get letters rogatory?

11 A Yes, sir, I am. Mr. Burns who was the Assistant
12 U. S. Attorney, in fact, was the person that I was in
13 most constant contact with, but what had happened was
14 that the allegation was that Mr. Brower and Forbes
15 had apparently, - are charged, indicted with being a
16 party to some sort of a conspiracy involving narcotics
17 in Toronto and the RCMP, Royal Canadian Mounted Police,
18 had conducted in concert with the Ontario Provincial
19 Police certain electronics surveillance of a hotel in
20 the City of Toronto and certain tapes were obtained
21 as a result of these interceptions and it was the desire
22 of the Assistant U. S. Attorney to produce those tapes
23 in this court as part of the prosecution case. The
24 United States Attorney's office was advised by the
25 senior official of the Federal Canadian Justice Department

1 in Toronto that it was his view that it would be
2 unlawful for the officers, the Canadian officers to
3 come to Buffalo and to disclose the contents of the
4 wiretaps and accordingly, the only way that was avail-
5 able to get that evidence was by way of letter
6 rogatory to ask the Canadian Court's cooperation so
7 that the witnesses could be subpoenaed to produce the
8 evidence in Toronto and have it sent that way.

9 Q I show you Defendant's Exhibit 2 which, your Honor,
10 is a certified copy under the seal of Mr. Adams in
11 this court being one of the exhibits in United States
12 against Brower. The criminal number that I referred
13 to, a letter to Mr. Burns, the United States Attorney's
14 office here from Mr. J. A. Isaac, prosecution group
15 head, Toronto Regional Office, the Department of
16 Justice. Are you familiar with that letter?

17 A Yes, I am, sir.

18
19 (Defendant's Exhibit Number 2

20 marked for identification.)

21
22 BY MR. RADLER:

23 Q And is that the letter that you had, - the information
24 that you had reference to?

25 A Yes, it is. I would just like to make one thing clear

1 to your Honor that this letter together with Mr.
2 Burns' affidavit formed part of the official records
3 of the court here and also the court in Toronto and
4 I am not, in any way, producing documents that were
5 produced to me in my capacity as counsel for the
6 United States Government, but they were official
7 documents.

8 Q It is okay, because we obtained this copy, the
9 certified copy right here in this court.

10 A I just want to make that clear.

11 Q You didn't do anything wrong.

12 A Okay.

13 THE COURT: I am sure you would do it right.

14 THE WITNESS: Thank you.

15
16 BY MR. RADLER:

17 Q And you have a copy of this, you happen to have a
18 copy of this in your file, don't you?

19 A Yes.

20 Q This letter says, "Quote, I regret, however, that the
21 considered view of my department is that the relevant
22 legislation does not authorize the release to you as
23 a law enforcement agency outside Canada, any documenta-
24 tion or other records relating to interceptions lawfully
25 made in the course of a criminal investigation in

1 Canada, does it not?

2 A That's what it says.

3 MR. RADLER: I offer this certified copy in
4 evidence, your Honor.

5 MR. PARRY: No objection.

6 THE COURT: It will be marked in evidence.

7

8 (Defendant's Exhibit Number 2
9 received in evidence.)

10

11 MR. RADLER: Does your Honor care to see this?
12 I suppose I have read the pertinent
13 portions of it already.

14 THE COURT: Go ahead, Mr. Radler.

15

16 BY MR. RADLER:

17 Q Now, Mr. Powell, I have shown to you, have I not, sir,
18 the affidavit of Postal Inspector Ronald L. Snyder,
19 verified April 13, 1977 which is part of the official
20 record in this case, - that is, the case in which you
21 are now testifying, correct?

22 A Yes, sir.

23 Q And which was presented to this Court, Judge Curtin,
24 as part of the Government's application for a search
25 and seizure warrant and for an order freezing the

1 bank accounts and other assets of Merchant Diamond
2 Group, Inc., the defendant in this case, have I not?

3 A Yes, sir.

4 Q You have reviewed this affidavit?

5 A Yes, I have.

6 Q And it appears that the affidavit, on the face of it,
7 is based upon wiretap or electronic surveillance data
8 and information obtained in Canada by the Royal
9 Canadian Mounted Police and then thereafter disclosed
10 to the affiant here, Ronald Snyder, is that right?

11 A Yes, it does.

12 Q Do you have an opinion as to whether, under Canadian
13 Law, based upon your qualifications and the testimony
14 that you have previously given, as to whether the
15 disclosure of that information by Corporal Kossatz
16 or whoever it was from the Royal Canadian Mounted
17 Police was lawful under Canada Law.

18 A It is my considered opinion that in the event that
19 it was not a lawful disclosure and I agree with the
20 letter of Mr. Isaac for whom I have great respect
21 also in his capacity with the Federal Justice
22 Department.

23 Q When you say you agree with the letter, you mean
24 Exhibit 2 here?

25 A Yes.

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1 Q That was written by Mr. Isaac on March 18, 1976 in
2 which it states that the legislation doesn't authorize
3 the release to the United States Attorney of any
4 records relating to interceptions lawfully made?

5 A Yes.

6 Q I am not asking you whether the interceptions are
7 lawful or not. Even if you assume the interceptions
8 are lawful, it is your opinion that the release and
9 disclosure and dissemination of that information by
10 the RCMP to Postal Inspector Snyder is not lawful
11 under Canadian Law, is that correct, sir?

12 A That is my opinion.

13 Q As a matter of fact, does it constitute, in your
14 opinion, an offense under Canadian Law?

15 A Yes, it does.

16 Q And in what respect would it constitute an offense?

17 A Well, it is a willful disclosure of both the content
18 and substance of the conversations as I read it, and
19 it is in detail and also the disclosure of the
20 existence of the wiretaps and the only way, - that
21 prima facie is a criminal offense, an indictable
22 offense and unless it falls within one of the
23 exceptions, then a person in my view is guilty of an
24 offense. The only way it can fall in one of the
25 exceptions is if those exceptions can be read to have

1 extra territorial effect outside of Canada and in my
2 view, it would specifically have to be legislated in
3 that way and it has not been. The definition of
4 peace officer is restricted.

5 Q That is also the view of Mr. Isaac?

6 A Yes, it is.

7 Q In another proceeding, right?

8 THE COURT: Excuse me, Mr. Radler. We have
9 no jury, so we do not have to go over
10 and over it again and again.

11 MR. RADLER: I am sorry.

12 THE COURT: We have clearly stated, I believe,
13 the opinion of the witness.

14 MR. RADLER: I apologize. I sometimes forget
15 there is no jury. I am sorry. May I
16 just have a minute with Mr. Fitzgerald?

17 THE COURT: Go ahead.

18 MR. RADLER: I beg the Court's indulgence. I am
19 sorry. No further questions.

20 THE COURT: Mr. Parry.

21
22 CROSS EXAMINATION BY MR. PARRY:

23 Q Mr. Powell, good afternoon.

24 A Yes, sir.

25 Q We haven't met before. I am George Parry. Mr. Powell,

1 I would like to ask you about your taking letters
2 rogatory in the matter of United States vs. Brower.
3 I believe you said that you were asked to do this by
4 the United States Government, is that correct?

5 A Yes, I was, sir.

6 MR. PARRY: May I see Defendant's Exhibit 2?

7 Do you have that?

8 MR. RADLER: I am sorry.

9 MR. PARRY: That is the letter.

10 THE COURT: That is the letter.

11
12 BY MR. PARRY:

13 Q Now, referring to D-2, it states in the second paragraph,
14 "It has occurred to me and some of my colleagues that
15 such disclosure might be made to you in proceedings
16 before a rogatory commission in Canada and it is my
17 suggestion that you consider that approach in light
18 of the practice that obtains in your jurisdiction".
19 Now, my question, I guess, is how does this rogatory
20 commission work and how does it, in effect, provide
21 a way around the statute for this type of disclosure?

22 A Well, what it does, one of the exceptions that I
23 referred to in Subsection (a) it not an offense
24 if the person discloses the existence of the private
25 communication for the purpose of giving evidence in

1 any civil or criminal proceedings.

2 Q Yes.

3 A That, in my opinion, would be restricted, obviously,
4 to civil or criminal proceedings in Canada and the
5 letter rogatory is a procedure internationally between
6 the various Courts, whereby one Court requests another
7 to allow its process to be used to obtain evidence
8 and Judge Elfvin, in this case, did issue a letter of
9 request or letter rogatory to the Chief Justice of the
10 High Court in Ontario that the Ontario court procedure
11 be used and they, in bringing that application to the
12 Supreme Court, Mr. Justice Heath, we also asked for an
13 order to take commission evidence of certain witnesses
14 and for the issuance of certain subpoenas, and the
15 subpoenas duces tecum to the officers to bring with
16 them the various recordings and transcripts that they
17 have. They are then, - have cause to appear before the
18 Ontario Court pursuant to lawful process. The exhibits
19 as they were in this case, in the Brower and Forbes
20 case were then tendered before the Commissioner and
21 identified, formed part of the record, which has now
22 been returned to this Court two or three weeks ago.
23 The officers have then complied in my view of the law,
24 by lawfully given evidence within Canada.

25 Q Now, was this action taken during the investigative

1 phase of this case? I mean, had an indictment been
2 returned at this point, do you know?

3 A Yes, it had, sir.

4 Q So that this occurred after the investigation had been
5 closed and the case was being prepared for trial,
6 is that correct?

7 A I am sure that that is the case, yes.

8 Q Now, going to the statute under 178.20, Subsection 2,
9 there is Paragraph (b).

10 A Yes.

11 Q Which is one of the exceptions and it says one of the
12 exceptions to this rule is in the course of or for
13 the purpose of any criminal investigation if the
14 private communication is lawfully intercepted.

15 A Yes.

16 Q Now, I note the caviat if the private communication
17 was lawfully intercepted. Can you tell us, at what
18 point, in your proceedings up there the determination
19 is made, whether or not the communication has been
20 lawfully intercepted?

21 A The practice that has been adopted since the Act came
22 into effect in the summer of '74 is there is always
23 a voir dire to determine the question of lawfulness
24 of an interception or the issue of consent if it is
25 going on the basis of consent.

1 Q Is there an assumption up to that point that the
2 interception was unlawful?

3 A That really has not been finally determined by our
4 Courts, but I would have to answer that by saying
5 "yes", there is an assumption that it is unlawful
6 until it is proven lawful. The Courts, to my knowledge,
7 have all determined the statute that there must be a
8 voir dire determination before any evidence can be
9 let.

10 Q Well, on what would you base your opinion that the
11 assumption is that the interception was unlawful up
12 until the time the Court decides that it was lawful?

13 A I can only, sir, go by the procedures that have been
14 followed, to my knowledge, in the wiretap cases that
15 have come before the Courts within our country since
16 the enactment of the law and if that were not the case,
17 then the prosecution or Crown would be tendering the
18 evidence on assumption of lawfulness and that is not the
19 case.

20 Q Well, I recognize that you have described the procedure
21 but, - and maybe I just don't understand anything about
22 Canadian procedure, but what I am getting at is this;
23 are you saying that because the Crown has to tender
24 the evidence at this voir dire, the assumption is that
25 that evidence or the presumption in Canadian Law is

1 that that evidence is illegal until found otherwise?

2 A Yes, sir, and I believe that is consistent with the
3 particular subsection .16 deals with the admissibility
4 or inadmissibility of evidence and that is that a
5 private communication is inadmissible unless there
6 has been an authorization and you must first determine
7 the issue of the lawfulness of the authorization before
8 you get to that point.

9 Q It is inadmissible as evidence?

10 A Yes.

11 Q But the question is, the question here is whether or
12 not it was lawfully obtained, so my question is not
13 whether or not it is admissible as evidence, but the
14 question is whether or not it was lawfully obtained
15 because that's what the exception deals with and my
16 question to you again is, is there a presumption that
17 information or communications intercepted pursuant to
18 a Court authorized wiretap are unlawfully obtained
19 until a voir dire is held to determine their admissibil-
20 ity?

21 A In my opinion, yes, there is.

22 Q And upon what would you base that opinion.

23 A Well, I think that the statute clearly reads that way.
24 If that were not the case, then the sections dealing
25 with the offenses and the admissibility sections take

1 on an entirely different meaning.

2 Q Now, where does the statute read that way? Maybe that
3 ought to be my next question.

4 MR. RADLER: For the record, I really object to
5 this because it is irrelevant. The
6 issue is not the lawfulness of the
7 wiretap.

8 THE COURT: Let us see. We will let him ask.
9 Overruled.

10 THE WITNESS: Subsection 17 11 states that,
11 "Everyone who, by means of an electro-
12 magnetic, acoustic, mechanical or other
13 device, willfully intercepts a private
14 communication is guilty of an indictable
15 offense and liable to imprisonment for
16 five years", so it seems to me that
17 the basic premise that anyone who
18 intercepts a private communication is
19 guilty of an offense.

20
21 BY MR. PARRY:

22 Q Well - -

23 A Then it goes on. I am sorry, go ahead.

24 Q No. I didn't mean to interrupt. I just wanted to
25 the exceptions.

A Then there are exceptions to that.

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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1 Q Right.

2 A But in my opinion, you cannot go to the exceptions and
3 presume them to have been met and there is a presumption
4 of unlawfulness until the issue of lawfulness has been
5 determined.

6 Q Well, it is one of the exceptions, - is one of the
7 exceptions the fact that, and I haven't read this,
8 but it is one of the exceptions based upon a peace
9 officer or a law enforcement officer obtaining a
10 Court authorized interception?

11 A Yes, sir.

12 Q Now, are there any other portions of the statute on
13 which you base your opinion?

14 A Just following from your statement - -

15 Q Yes.

16 A If an officer, in my view, opinion, had a Court
17 authorization - -

18 Q Yes.

19 A And disclosed that publicly, not to a peace officer
20 within Canada, in the best administration of justice
21 or within one of the exceptions, it would be my view
22 that he was guilty of an offense and the officers, to my
23 knowledge, in the Province of Ontario have been so
24 instructed because there is a presumption of unlawfulness
25 and they must not disclose it in any capacity

1 other than to peace officers within Canada or for
2 one of the other exceptions.

3 Q Well, you are talking now about the peace officer
4 exception and I am asking you about the exception
5 which refers to in the course or for the purpose of
6 any criminal investigation. Now - -

7 THE COURT: Is there any definition? You do
8 not have the book here that defines
9 "peace officer", is that it?

10 THE WITNESS: I have it, yes, sir. It is part
11 of the criminal code and I have it here.

12 THE COURT: All right.

13 MR. PARRY: I can give you that section.

14 THE COURT: Is there anywhere, a definition
15 of the term "criminal investigation"?

16 THE WITNESS: No, sir, there is not. The only
17 thing that I can say is that in any
18 of the early sections of the code, they
19 talk in term of criminal acts. It is
20 entirely restricted to activity which
21 is within Canada.

22 THE COURT: Is there any definition of the
23 word "criminal proceeding" in the code?

24 THE WITNESS: No, sir, there is not.

25 THE COURT: Before I forget, Mr. Powell, I

1 think Mr. Radler covered this, but
2 perhaps he did not and we should make
3 this clear on the record. You have been
4 in private practice for about how long?

5 THE WITNESS: Since last September, sir.

6 THE COURT: Last September, and September of
7 1976, what was your position then?

8 THE WITNESS: My position was Assistant Deputy
9 Attorney General in charge of criminal
10 law for what was then called the
11 Ministry of the Attorney General of the
12 Province of Ontario.

13 THE COURT: I see, and you had that position
14 for about how long?

15 THE WITNESS: That position I held for three years.

16 THE COURT: Do you have any associates in the
17 practice of law?

18 THE WITNESS: At the present time?

19 THE COURT: Yes.

20 THE WITNESS: Yes. I am in practice with Robert
21 Carter in Toronto and it is the old
22 carrying on of the firm of Martin and
23 Hard. Mr. Carter carried on the practice
24 for many years, and Mr. Martin went to
25 the Court of Appeals three years ago.

1 THE COURT: Did Mr. Martin write the book?

2 THE WITNESS: Actually, it is a different Mr.

3 Martin. Mr. Martin has written many

4 books in Canada.

5 THE COURT: Are there a number of other

6 associates in the firm, or just two or

7 three?

8 THE WITNESS: No, sir, just the two of us.

9 THE COURT: Does your associate or yourself

10 have any interest whatsoever in the

11 Merchant Diamond Group?

12 THE WITNESS: In this particular case, yes, sir,

13 I do.

14 THE COURT: You do?

15 THE WITNESS: Yes, sir.

16 THE COURT: What is that, please?

17 THE WITNESS: I have acted and am acting on behalf

18 of the company in Toronto, brought an

19 application before the Supreme Court to

20 require the RCMP to produce the records

21 for copying so that they might be made

22 available for the procedure before this

23 Court and also I expect that we will be

24 representing one of the accused in

25 criminal proceedings in Canada.

1 THE COURT: There is a parallel investigation
2 going on in Ontario to the proceeding
3 which is going on here in the United
4 States on Merchant Diamonds. That is
5 the sale of diamonds by telephone?
6 THE WITNESS: Yes, sir.
7 THE COURT: You are in the capacity similar
8 to that, - Mr. Radler has here, you have
9 a capacity similar to his in Ontario.
10 THE WITNESS: The procedure has gone a step
11 further and did some two months ago in
12 Toronto where charges were laid against
13 officials or representatives of the
14 company.
15 THE COURT: I see.
16 THE WITNESS: In relation, as I know, the
17 identical matter that is here, but there
18 are no charges in the States.
19 THE COURT: But you represent the corporation
20 and some of the individuals involved
21 in the corporation in Ontario?
22 THE WITNESS: Yes, sir, I do.
23 THE COURT: All right. Mr. Parry.
24 MR. PARRY: I have no further questions.
25 Thank you, Mr. Powell.

1 THE COURT: Could I see the letter, please?
2 THE WITNESS: Yes.
3 THE COURT: In the letter here, and I am looking
4 at Defendant's Exhibit 2, the documenta-
5 tion or other records relating to
6 interceptions, is this the interceptions
7 themselves that Mr. Isaac was referring
8 to?
9 THE WITNESS: Yes. They were, as I understand
10 it, the tapes and the transcripts of
11 the tapes.
12 THE COURT: In addition to the opinion of Mr.
13 Isaac, he said, "It is the view of my
14 department". He cites no authority
15 or anything but this was after he talked
16 to his fellows there. Is there any
17 other citation you have to support his
18 view here?
19 THE WITNESS: I know of, - can find no case, sir,
20 that deals with the point. I can only
21 say Mr. Isaac, and I point again,
22 represents the Federal Government which
23 is, in fact, responsible for the passage
24 of the statute while my old employer,
25 if you will, the Province, is involved

1 with the enforcement and he is involved
2 also in narcotics prosecution, so his
3 department in that sense, when he
4 refers to "my department", is something
5 different than what was my employer in
6 the sense one is the Province and one
7 is the Federal Government.

8 THE COURT: Mr. Radler.

9 MR. RADLER: No, I have no further questions of
10 the witness.

11 THE COURT: Thank you, Mr. Powell.

12 THE WITNESS: Thank you.

13 THE COURT: Mr. Radler.

14 MR. RADLER: If your Honor please, I would like
15 to, based upon the testimony of this
16 witness, move, at this time, for a
17 judgment with respect to our application
18 under 41(e).

19 THE COURT: I think that it may be that we
20 will have to have some law on this.

21 MR. RADLER: I am sorry, sir?

22 THE COURT: We have this problem, and I am not
23 here, - we are here to listen to witnesses
24 today and I do not want to have extended
25 argument on this problem today because

1 there are, as you know, here under the
2 exclusionary rules in the United States
3 it is a mixed bag. Sometimes, if the
4 officer violates the law, the evidence
5 is excluded. Sometimes, if he violates
6 the law, it is not, so I think what we
7 should do is we will just defer argument
8 and consideration on this particular
9 ground and we will continue on the
10 other ground.

11 MR. RADLER:

As your Honor can see, I am prepared
12 to go forward, but I think if I might,
13 I would like to make the point that I
14 tried to make in my objection.

15 THE COURT:

No, sir. I want the evidence
16 today.

17 MR. RADLER:

All right, sir.

18 THE COURT:

The evidence. You are going to
19 have an opportunity to make your argument
20 and we will consider it very carefully,
21 but we are here today to listen to the
22 evidence.

23 MR. RADLER:

All right, sir. Mrs. Dinino.

24
25 * * * * *

1 T H E R E S A D I N I N O (3621 Dixie Road, Mississauga,
2 Ontario, Canada), a witness called by and in behalf of the
3 defendant, having been first duly sworn, was examined and
4 testified as follows:

5

6 DIRECT EXAMINATION BY MR. RADLER:

7 Q Mrs. Dinino, just speak right into the microphone.

8 A Fine.

9 Q By whom are you employed?

10 A By Merchant Diamond.

11 Q And where are you so employed?

12 A In Toronto.

13 Q All right. Are you married?

14 A Yes, I am.

15 Q And what is your job at Merchant Diamond?

16 A Office manager.

17 Q And for how long have you been office manager of
18 Merchant Diamond?

19 A Year and a half.

20 Q Can you tell me and the Court generally, what your
21 duties are as office manager of Merchant Diamond?

22 A To put the checks, when they come in, into the right
23 account, the shipping of diamonds and to do the forms
24 for the customers and also various other office duties.

25 Q Are you, - I am sorry.

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1 A And daily figures and the bookkeeping to give it to
2 the bookkeeper.

3 Q Are you familiar with the books and records of Merchant
4 Diamonds generally? I don't mean that you are an
5 accountant but do you know what the records are; do you
6 work with the records?

7 A Yes, every day.

8 Q And are you familiar with, - strike that. Do you know
9 how Merchant Diamonds, in general terms, acquires its
10 diamonds, how does it buy its diamonds?

11 A Through a supplier.

12 Q And in that connection, does it receive invoices from
13 suppliers who sell the diamonds to Merchant Diamonds
14 which in turn resells those diamonds?

15 A Yes.

16 Q Are you familiar with those invoices?

17 A Yes.

18 Q And are you in charge of receiving those invoices?

19 A Yes.

20 Q How about the payments of the invoices from suppliers,
21 are you in charge of those?

22 A Yes.

23 MR. RADLER: Your Honor, I have a series of
24 documents in one folder which I would
25 like to mark as one exhibit if I may.

1 THE COURT: Fine. It may be marked.

2

3

(Defendant's Exhibit Number 3

4

marked for identification.)

5

6

BY MR. RADLER:

7

Q Mrs. Dinino, I show you Defendant's Exhibit 3 which
8 is a packet of invoices and for the record, with the
9 permission of the Court, the envelope in which they
10 are contained has a notation by someone in our office
11 called "Invoices from suppliers, September '76 to
12 March '77, chronological order". I think it is
13 innocuous enough but it is on there and it was put on
14 by our office. Can you tell us what those records are?

15

A These are the supplier's invoices to us for the buying
16 of diamonds.

17

Q And they cover the period of time, September '76 to
18 March '77, right?

19

A Yes.

20

Q Now, I notice that these are copies. Where are the
21 originals, do you know?

22

A They are in the Royal Canadian Mounted Police in Toronto.

23

Q And how did you obtain these copies?

24

A I had to ask permission to go down to copy our records.

25

Q Okay. Are these true and correct copies of the original

4

1 records that are in the hands of the Royal Canadian
2 Mounted Police?

3 A Yes.

4 Q And are they true and correct copies of records kept
5 in the regular course of the business of Merchant
6 Diamond?

7 A Yes.

8 Q And they show, do they, invoices from suppliers who
9 sold diamonds to Merchant Diamond Group from September
10 '76 to March of '77, is that right?

11 A Yes.

12 Q When did Merchant Diamond Group, Inc., United States
13 Corporation begin business in the United States, to
14 your knowledge?

15 A May, in Florida.

16 Q No. I meant to say in New York. I am sorry.

17 A In New York it would be September.

18 Q September of 1976?

19 A Yes.

20 Q Which would be the time frame that correlates with
21 these documents, is that right?

22 A Yes.

23 MR. RADLER: Now, for the assistance of the Court
24 and because there is no jury, we have
25 prepared a chart which really, and I will

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5

1 identify the backup material from this
2 packet as soon as I offer it, - that
3 shows the appreciation of diamonds,
4 September of '76 to March '77 and in
5 fairness, it really should state as
6 reflected in the invoices of this company.
7 I am not suggesting that this is the
8 Bible on diamond appreciation. What it
9 is, is the record in graphic form of
10 what our client actually paid for diamonds
11 and how they, - that is, the diamonds
12 which they purchased appreciated, so I
13 would offer in evidence before we go to
14 the chart and these records, Defendant's 3.

15 MR. PARRY:

Your Honor, for purposes of saving
16 time in these proceedings, I would like
17 an opportunity to study this so for right
18 now I will waive any objection and we
19 can go ahead.

20 THE COURT:

We can go ahead with it. Thank you,
21 Mr. Parry.

22
23 (Defendant's Exhibit Number 3
24 received in evidence.)
25

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6

1 BY MR. RADLER:

2 Q Thank you. Incidentally, these records are copies
3 of what the Royal Canadian Mounted Police have, right?

4 A Yes.

5 MR. RADLER: Okay.

6
7 (Defendant's Exhibit Number 4
8 marked for identification.)
9

10 MR. RADLER: In looking at Exhibit Number 4,
11 I don't know if your Honor can see it
12 or not.

13 THE COURT: I will walk down.

14
15 BY MR. RADLER:

16 Q All right. It shows on the first sheet of Exhibit 4, -
17 it is a sheet with 4 separate categories. Namely, the
18 first being the type of diamond, the price per carat
19 in September of '76, the price per carat in March of '77
20 and the percentage of increase, right?

21 A Yes.

22 Q You see those, and then really for graphic illustration
23 we have taken the next six sheets merely reflected in a
24 graph form, the increase for each of those carat sizes,
25 right?

7

1 A. Yes.

2 THE COURT: Excuse me. Did you prepare the
3 chart?

4 THE WITNESS: I prepared the figures.

5 THE COURT: The figures.

6 MR. RADLER: No. The chart for the record was
7 prepared by a paralegal in our office
8 with her assistance yesterday.

9 THE COURT: After the chart was prepared, the
10 figures that are there, did you compare
11 the chart with the records which you just
12 discussed?

13 THE WITNESS: Yes.

14 THE COURT: You did the work carefully?

15 THE WITNESS: Yes.

16 THE COURT: And the chart accurately reflects
17 in a graphic way what is in the invoices?

18 THE WITNESS: Yes.

19 THE COURT: All right. Go ahead.

20 MR. RADLER: Maybe I don't have to identify the
21 invoices. There are only a few. If you
22 would like me to I will, for the record.

23 THE COURT: Whatever you believe is necessary.

24 MR. RADLER: Well, I would like to make a full
25 record, I believe. We will do it that way.

1 THE COURT:

All right.

2

3 BY MR. RADLER:

4 Q The first carat size is .20. Will you just, very
5 briefly, for the Court's information, explain what that
6 is.

7 A That's a .20 carat diamond.

8 Q Is that a fairly small diamond?

9 A That is a very small one.

10 Q All right, and referring to Exhibit 3 which contains
11 a series of invoices, I show you Invoice Number 1947
12 dated September 24, 1976 from Belle Bijaux, Limited
13 and the first entry on that is for a .20, - some .20
14 diamonds, right?

15 A Yes.

16 Q And what was the price per carat to you, - that is,
17 to Merchant Diamond in September of '76?

18 A \$362.

19 Q That is the first figure reflected there, is it?

20 A Yes.

21 Q All right. Now, as a matter of fact, in this particular
22 stone or size in December of 1976 it increased, did
23 it not?

24 A Yes. I believe the record is there.

25 Q After this it is basically contained in two invoices,

1 your Honor, and I show you from Exhibit 3 an invoice
2 from Commonwealth Gem Stones dated December 30, 1976
3 and what was the price of a .20 diamond at that point?

4 A Four eighty-one.

5 Q Now, I notice that is a different supplier, is that
6 right?

7 A Yes, it is.

8 Q And can you explain that to the Court?

9 A We use different suppliers.

10 Q And are the diamonds the same size?

11 A Yes.

12 Q And do you know, based upon your own workings, whether
13 they are essentially of the same quality?

14 A Yes.

15 Q Now, that's an increase of 32.8 per cent in this case
16 from September to December, is that right?

17 A Yes.

18 Q That's what you actually paid. Were these invoices
19 all paid?

20 A Yes, they were. The check number is on them.

21 Q Just go down to the next category. The next size is
22 .25, is it not?

23 A Yes.

24 Q And the first price shown is \$410. Maybe to speed it
25 up, have you looked at an Invoice Number 1931 dated

10

- 1 September 8, 1976 which is in this packet?
- 2 A Yes.
- 3 Q And the price in September of '76 is \$410, isn't it?
- 4 A Yes.
- 5 Q For that carat and then on March 28, 1977 pursuant to
- 6 Invoice Number 55021, what was the price?
- 7 A Five fifteen.
- 8 Q Then as we go down we see the next type o diamond is
- 9 .33 diamond, is that right?
- 10 A Yes.
- 11 Q Looking at Invoice Number 1950 dated September 20, 1976
- 12 which we looked at this morning, you and I, did we not?
- 13 A Yes.
- 14 Q The price was how much?
- 15 A \$483.
- 16 Q And then in March of '77 what was the price?
- 17 A Six hundred forty-five.
- 18 Q Showing an increase of what?
- 19 A 33.5 per cent.
- 20 Q The next size diamond is a .50 diamond. What is that,
- 21 a half carat?
- 22 A That is half carat.
- 23 Q Looking in that connection as part of Exhibit 3, Invoice
- 24 1950, September 20, 1976, the price was how much?
- 25 A \$690.

11

1 Q And if we look again at the same invoice, namely,
2 55021, what was the price in March of 1977?

3 A \$950.

4 Q And .75 carats, using Invoice 1950 in September of
5 1976, how much was paid by Merchant Diamond Group
6 based upon your examination of the records?

7 A \$1,072.

8 Q And what did Merchant Diamond Group pay for the same
9 size diamond in March of 1977?

10 A \$1,430.

11 Q And finally a one carat diamond was acquired in
12 September of 1976 under Invoice 1950 and how much was
13 paid by Merchant Diamond Group at that point?

14 A \$1,840.

15 Q And the price per carat paid under Invoice 55021 was
16 what?

17 A \$2,118.

18 Q That would be in March of 1977, is that right?

19 A Yes.

20 Q These other charts that follow as I mentioned, without
21 being repetitive, were prepared really at your direction
22 with our people this week, right?

23 A Yes.

24 Q And they just reflected graphically?

25 A Yes.

12

1 MR. RADLER: If your Honor please, could I just
2 have a minute because I have another
3 independent witness.

4 THE COURT: Certainly.

5 MR. RADLER: I would like to explain what is
6 happening to him.

7

8 (Defendant's Exhibit Number 5
9 marked for identification.)
10

10

11 BY MR. RADLER:

12 Q So that I can understand and perhaps we can make it
13 clear, hopefully, to the Court, in conducting the books
14 and keeping the records of sales and purchases by
15 Merchant Diamond Group with respect to its customers,
16 do you have some kind of a form that you use, and I
17 am referring now to Defendant's Exhibit 5?

18 A Our client cards.

19 Q Well, that is what I have reference to, yes.

20 A Yes.

21 Q Okay. Looking at Defendant's Exhibit 5, will you tell
22 us what this package that has been so marked is?

23 A These are the client's cards and they are just the ones
24 that are paid.

25 Q All right.

13

- 1 A All paid.
- 2 Q Are they the client's cards for United States purchases?
- 3 A Yes, they are.
- 4 Q And who prepared these?
- 5 A I ran a copy off.
- 6 Q And where did you get these?
- 7 A From the Royal Canadian Mounted Police Building.
- 8 Q Now, taken out of there are client cards which reflect
- 9 transactions in which the client resold the diamonds,
- 10 is that right, to Merchant Diamond Group?
- 11 A Yes.
- 12 Q So Exhibit 5, is it a fair statement, represents all
- 13 the client cards of U.S. customers minus those cards
- 14 which reflect a resale of the diamond to Merchant Diamond
- 15 Group, is that right?
- 16 A Yes.
- 17 Q And we will come to those. We have those over there,
- 18 right?
- 19 A Yes.
- 20 Q Now, could you explain for everybody's identification
- 21 how this works? I refer you to the first carat. Well,
- 22 let me just introduce these because this is merely
- 23 foundation for some of the testimony. Mr. Parry, I
- 24 don't know whether you have looked at all these but all
- 25 these really are foundation evidence so that she can

14

1 testify to some of the findings that are contained
2 there.

3 MR. PARRY: I will waive my objection for now.

4

5 (Defendant's Exhibit Number 5
6 received in evidence.)

7

8 (Defendant's Exhibit Number 6
9 marked for identification.)

10

11 BY MR. RADLER:

12 Q I show you Defendant's Exhibit 6 and can you tell me
13 what these are, Mrs. Dinino?

14 A These are the clients that we bought back the diamonds
15 from.

16 Q In this particular packet, because there aren't so
17 many, we have both Canadian acquisitions, repurchases
18 and American repurchases, right?

19 A Yes.

20 Q And we have broken out the American repurchases in this
21 Exhibit. That has not yet been marked, is that right?

22 A Yes.

23 Q So if you take Exhibit 5 and Exhibit 6 to the best of
24 your knowledge will you have a full and complete copy
25 of all of the client cards of United States customers?

15

1 A Yes.

2 MR. RADLER: So I will offer 6 as well.

3 THE COURT: Mr. Parry.

4 MR. PARRY: I will waive for now.

5

6 (Defendant's Exhibit Number 6
7 received in evidence.)

8

9 THE COURT: Are these all the United States
10 customers or simply the United States
11 customers that you repurchased from?

12 THE WITNESS: The chart down there is the ones
13 that we repurchased from.

14 THE COURT: I see. This packet here is - -

15 THE WITNESS: All of them. This is all of them
16 and this is the repurchase of our clients.

17

18 BY MR. RADLER:

19 Q Including, so the record is clear because we haven't
20 broken it out, in the repurchase these have the
21 Canadian as well, but we have broken out the Americans
22 on the chart graphically. All right. So now if we
23 take 5 and 6 together we have all the cards of all the
24 United States customers?

25 A Yes.

16 1 Q Do we not?

2 A Yes.

3 Q Okay. Now, if we look at a typical client card, could
4 you explain, and maybe the best thing to do would be
5 to take an American card, okay. If you take the card
6 for, - well, can I just have a minute, if your Honor
7 please. Let's just take the first one on the chart
8 which we are going to mark in just a second. If you
9 take the card contained in Exhibit 6 for Robert L. Steele,
10 okay?

11 A Yes.

12 Q Can you show us or tell us in the record how the client
13 record is kept with respect to the time he purchased
14 it, a diamond or a group of diamonds, the cost of the
15 diamonds and any resale activity, if any?

16 A Yes.

17 Q All right. Referring now, - you are referring now to
18 a card contained in Exhibit 6 for Mr. Robert L. Steele,
19 right?

20 A Yes. Shall I read the whole purchase as it goes down?

21 MR. RADLER: The Court is right behind you so
22 maybe he will be interested.

23 THE COURT: Why not read it.

24 THE WITNESS: Fine. January 26, '77, Package 1F
25 which consists of two .25, paid \$630. It

17

1 was \$630 he paid for it February 3 and
2 this is the salesman, A. Himmelfarb.
3 February 16th '77 he purchased Package
4 Special Number 1, half carat, for \$1,120.
5 He cancelled that order and on April 12,
6 '77 he sold his Package 1F for \$642.50
7 and the check was mailed to him, Check
8 Number 1197.
9

10 BY MR. RADLER:

11 Q So that's the way you keep a record of a client's
12 transaction with the company, right?

13 A Yes.

14 Q And with respect to Mr. Steele, he is one of those
15 individuals to whom Merchant Diamond Group, - from whom
16 Merchant Diamond Group resold, is that right?

17 A Yes.

18 Q Or repurchased, I should say.

19 A Repurchased, yes.

20 MR. RADLER:

21 Now, again to assist the Court, -
22 hopefully assist the Court, we have
23 prepared a chart which I guess we are
24 fortunate we didn't mark at that time
25 because I would like to mark it now for
identification.

18

1 THE COURT: Just mark it in pencil.

2 MR. RADLER: It will be 7.

3

4 (Defendant's Exhibit Number 7
5 marked for identification.)
6

7 BY MR. RADLER:

8 Q At my request, Mrs. Dinino, did you go through all of
9 the client cards to determine how many transactions in
10 the United States involved a situation where Merchant
11 Diamond Group, Inc., repurchased the diamonds that they
12 had previously sold, or diamond that they had previously
13 sold to the client from that client.

14 A Yes.

15 Q And does Defendant's Exhibit 7, being a chart prepared
16 by our office, reflect to the best of your knowledge,
17 based upon the records photocopied by you at the Royal
18 Canadian Mounted Police Headquarters all of the client, -
19 all of the client's transactions in which Merchant
20 Diamond Group repurchased diamonds?

21 A Yes.

22 Q Did you provide the information that went into this
23 chart?

24 A Yes.

25 Q And at my request yesterday when we were in Toronto,

19

1 did you check it against these client cards?

2 A Yes.

3 MR. RADLER: I can go through each invoice but
4 I really would prefer not to.

5 THE COURT: I do not see any, - as long as Mr.
6 Parry has an opportunity to check the
7 invoices.

8 MR. RADLER: Yes, sir.

9 THE COURT: And to ask questions here it would
10 seem to me you really would not have to.

11

12 BY MR. RADLER:

13 Q I would hope not. For the record they are all in this
14 Exhibit, aren't they, Exhibit 6?

15 A Yes.

16 Q Okay. Now, Postal Inspector Snyder, - I showed you
17 the Snyder affidavit, didn't I, in which he makes the
18 allegation that there were only ten repurchases in the
19 United States between February of 1977 and April 1977?

20 A Yes.

21 Q Based upon your examination of the records, is that true?

22 A No.

23 MR. RADLER: I will have to mark these in pencil.

24

25

20

1

(Defendant's Exhibit Number 8

2

marked for identification.)

3

4

MR. RADLER:

8 is American resales, February 2,

5

1977 to April, '77 and 9 is Canadian

6

resales, February 2, 1977 to April, '77.

7

8

(Defendant's Exhibit Number 9

9

marked for identification.)

10

11

BY MR. RADLER:

12

Q I show you Defendant's Exhibit 8 and 9 and I ask you
what they are.

13

14

A They are invoices.

15

Q And what do they reflect?

16

A They reflect the sale of diamonds, the repurchases
back by Merchant Diamond.

17

18

Q In other words, Merchant Diamond repurchased diamonds?

19

A Yes.

20

Q Actually during February 2, 1977 to April, '77 based
upon your examination and computation of the records,
how many transactions in fact, did Merchant Diamond
have with respect to resales in just that time period?

21

22

23

24

A There was fourteen American and twenty-nine Canadian.

25

Q Not ten?

21

1 A. No.

2 Q. And that is from the records, isn't it?

3 A. Yes, it is.

4 Q. These are records kept in the regular course of business
5 of this company, right?

6 A. Yes.

7 Q. Forty-three resales in that time frame?

8 A. Yes.

9 Q. Now, as part of your duties, were you in charge of the
10 bank accounts of Merchant Diamond Group?

11 A. Yes.

12 Q. When I say that I should amend it to ask you specifically
13 with respect to the United States Company, Merchant
14 Diamond Group, Inc., were you in charge of that bank
15 account too?

16 A. Yes.

17 Q. I think the package that we had, your Honor, were those
18 records. Can I have just a moment with Mr. Fitzgerald?
19 In connection with its business, Mrs. Dinino, did
20 Merchant Diamond Group, Inc., maintain bank accounts
21 in the United States?

22 A. Yes.

23 Q. And where were those accounts kept?

24 A. At the Marine Midland Bank at the Statler Hilton.

25 Q. And what kind of accounts did they have, do you know?

22

1 A We had three accounts.

2 Q Tell the Court what they were.

3 A The client's trust, the operating account and the
4 savings account.

5 Q What was the purpose of the client's trust account?

6 A The client's trust account was for the purpose of
7 keeping the client's money in the account until the
8 diamonds were shipped to them.

9 MR. RADLER: I will continue to mark because I
10 still don't see Mr. White. What are we
11 up to now?

12
13 (Defendant's Exhibit Number 10
14 marked for identification.)

15
16 BY MR. RADLER:

17 Q I show you a copy of a statement from the Marine Midland
18 Bank, Statler Hilton Office for the period April 29,
19 1977 to May 31, 1977. That is the, - what account is
20 that, and it is Account Number 756750440, right?

21 A That's right.

22 Q What is it?

23 A I can't remember the account numbers.

24 Q No, no, no. What is that? Is that your trust account
25 has a balance of three hundred seventy-five thousand?

23

1 A That would be the client trust account with that balance.

2 Q So as of that date which is subsequent to the freeze
3 order there was in the client's trust account \$375,931.67,
4 is that right?

5 A Yes.

6 Q Okay. Exhibit 11 shows a balance of \$33,436.10 and
7 that is Account Number 756750377. What is that account?

8 A Going by the balance in the account, that was our
9 operating account.

10 Q And that is also a statement for the period subsequent
11 to the freeze account, is that correct?

12 A Yes.

13 Q Finally, did you have a savings account at the Marine?

14 A Yes.

15 Q And that shows on Exhibit 12, Account Number 756-44532-9
16 a balance of \$20,625.31, does it not?

17 A Yes.

18 MR. RADLER: Because we are without a jury, your
19 Honor, I think I can comment fairly and
20 I don't see that Mr. Parry would have a
21 quarrel with this. It is our understanding
22 that while Exhibit 12 shows closed, this
23 account was actually seized rather than
24 frozen so that the twenty thousand six
25 hundred, that is accurate, isn't it, Mr.
Parry?

H. T. Noel & E. F. Knislev

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WESTERN DISTRICT OF NEW YORK

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24

1 MR. PARRY: Yes, it is.

2 MR. RADLER: The money in the savings account
3 is actually in the hands, I guess, of
4 the Government or somebody or the proper
5 authority.

6 THE COURT: Mr. Parry, the Government has it?

7 MR. PARRY: Yes, sir. It is in a separate
8 account at the Marine Midland Bank and
9 Mr. Snyder, the Postal Inspector, is the
10 trustee of that account.

11

12 BY MR. RADLER:

13 Q Okay. These are the three bank accounts of your
14 employer, are they not?

15 A Yes.

16 MR. RADLER: I will offer those in evidence
17 under the same stipulation that I assume
18 we have been following.

19 MR. PARRY: Yes.

20 MR. RADLER: Namely that you will have an
21 opportunity to look at them.

22

23 (Defendant's Exhibit Number 10
24 received in evidence.)

25

25

1 MR. RADLER:

I would like to talk about that
2 account, namely the trust account. I
3 will mark this 13.

4
5 (Defendant's Exhibits Numbered 11
6 and 12 received in evidence.)

7
8 (Defendant's Exhibit Number 13
9 marked for identification.)

10
11 BY MR. RADLER:

12 Q With respect to the client's trust account which is
13 Exhibit 10 and which shows a closing balance of \$375,931.67,
14 contained in that account are there monies which have
15 been paid by clients of Merchant Diamond who have paid
16 for diamonds but have in fact not received diamonds
17 because of the freeze order in these proceedings?

18 A Yes.

19 Q And at my request, did you segregate and photocopy the
20 client account cards for those customers who have paid
21 for but have not received diamonds?

22 A Yes.

23 Q And whose funds are in the account bearing Exhibit
24 Number 10 which has a balance of \$375,931.67?

25 A Yes.

1 Q And are those cards contained in Exhibit 13?

2 A Yes.

3 Q And at my further request did you run a tape as to the
4 monies contained in that account which represent funds
5 sent by clients who have not received their diamond
6 because, - their diamonds because of these proceedings?

7 A Yes.

8 Q What is the amount?

9 A \$142,545.

10 Q So from that account there is due and owing to customers
11 whose names are contained in Exhibit 13 the sum of
12 \$142,545, is that right?

13 A Yes.

14 Q Now, are there, based upon your examination of all the
15 records, - namely, all of the client cards which we
16 have marked here previously for the United States as
17 Exhibits 5 and 6, and to the best of your knowledge,
18 are there any customers who have paid for diamonds but
19 have not received diamonds other than those in Exhibit 13?

20 A To the best of my knowledge, no.

21 MR. RADLER: Once again, your Honor, I will offer
22 13 on the same stipulation and so the
23 record is clear, because without Mr. White
24 I am not sure I have done it, all these
25 Exhibits that I have asked the witness to

27

1 identify, being the books and records
2 of the company, I will offer in evidence.

3 THE COURT: I have asked Mr. White to come right
4 back.

5 MR. RADLER: I just don't remember, quite
6 frankly, whether I offered 5 and 6, for
7 example.

8 THE COURT: All right. They will all be
9 considered as part of the record.

10 MR. RADLER: All right, sir. Thank you.

11
12 (Defendant's Exhibit Number 13
13 received in evidence.)

14
15 MR. RADLER: If I may just have one moment,
16 your Honor. I am almost done. I am
17 almost through with the witness, your
18 Honor, but I need to just find something.

19 THE COURT: Let us take a recess, about ten
20 minutes and we will return and in the
21 meantime Mr. Parry can look at the papers
22 and when you are finished ask any questions
23 he desires.

24
25 (Recess taken at 3:45 p.m.)

28

1 PROCEEDINGS: After recess, 4:00 p.m.

2 APPEARANCES: As before noted.

3

4 T H E R E S A D I N I N O, a witness called by and in behalf
5 of the defendant, having been previously duly sworn, resumed
6 the witness stand and testified further as follows:

7

8 DIRECT EXAMINATION BY MR. RADLER (RESUMED):

9 THE COURT: We had received a warning before that
10 they were going to be working on the air
11 conditioning system in the courtroom and
12 I guess it is beginning to shoot hot air
13 into the room but maybe it will not get
14 too bad before it is time to leave. I
15 plan to continue until 5:00 today and
16 then after that, because of other
17 commitments, I will not be able to be
18 with you tomorrow or Friday but we can
19 take this up again Monday afternoon at
20 2:00 and then we would finish it up either
21 Monday or Tuesday.

22 MR. RADLER: I see, sir. Okay. Could I, in that
23 light, have just a minute with one of my
24 witnesses who, I think, has a problem.

25 THE COURT: Surely.

29

1 MR. RADLER: Excuse me.

2 THE COURT: Surely.

3

4 BY MR. RADLER:

5 Q Just a few more questions from me. Mrs. Dinino, as
6 part of the record in this case and appended to the
7 search warrant signed April 14, 1977 by Judge Curtin
8 for the safe deposit box at the Statler Hilton is a
9 list of inventory. Did you maintain, - did Merchant
10 Diamond Group maintain a safe deposit box at the Statler
11 Hilton Marine Midland Bank?

12 A Yes.

13 Q And have you examined the inventory which is denominated
14 Exhibit A attached to the search warrant of April 14,
15 1977?

16 A Yes.

17 Q And is that merchandise, merchandise, - well, what is
18 that merchandise? Just tell me what it is.

19 A That is merchandise which belongs to Merchant Diamond
20 Group.

21 Q What is it?

22 A It is exchanges and repurchases.

23 Q And that consists of diamond disks, is that right?

24 A Yes.

25 Q And packets of diamonds, is that right?

1 A Yes.

2 Q And some other miscellaneous items?

3 A Yes.

4 Q And does any, - is any of that consigned to customers
5 or clients of Merchant Diamond Group?

6 A No.

7 Q It is all returned or exchanged property or just
8 inventory of Merchant Diamond, is that right?

9 A Yes.

10 Q Thank you. I think I am through, your Honor. Let me
11 just make sure. Mr. Fitzgerald has asked me to make
12 sure that you understand we are talking about all of
13 the items that are listed in that inventory, that is
14 all property of Merchant Diamond Group?

15 A Yes, it is.

16 Q All four pages of the inventory?

17 A Yes.

18 MR. RADLER: I have no further questions at this
19 time.

20 THE COURT: Mr. Parry.

21
22 CROSS EXAMINATION BY MR. PARRY:

23 Q Mrs. Dinino, good afternoon.

24 A Good afternoon.

25 Q I am George Parry. We haven't met before?

1 A No.

2 Q Mrs. Dinino, did you know an individual at Merchant
3 Diamond Group called Terry Hiltz?

4 A That is my name before I was married.

5 Q All right, and when did you get married? I hate to
6 ask.

7 A That's all right. I was a widow for fifteen years and
8 I just got married two years ago.

9 Q Now, in the course of your duties at Merchant Diamond
10 Group, did you have occasion to discuss matters,
11 business matters with Mr. Gerald Doren?

12 MR. RADLER: I am sorry. I can't hear you.

13 What was the question?

14 THE COURT: You can use the microphone there.

15 BY MR. PARRY:

16 Q All right. In the course of your - -

17 A I would discuss only matters pertaining to my office
18 work. Is that what you mean?

19 Q Yes. That is, your duties and the duties that you
20 discharged at Merchant Diamond Group?

21 A Yes.

22 Q Did you ever discuss with Mr. Doren the question of
23 setting price on the diamonds that were to be sold to
24 the customers of Merchant Diamond Group?
25

1 A. No.

2 Q. Did he ever indicate to you that a certain markup
3 should be placed on the diamonds that were purchased
4 from the suppliers?

5 A. To the best of my knowledge, no. He might have set a
6 percentage at some time depending on the amount of
7 money that we took in per week but that would be all.

8 Q. May I have just a moment, your Honor. Mrs. Dinino, in
9 the course of your employment with Merchant Diamond
10 Group, did you ever have occasion to communicate with
11 Mr. Calderia?

12 A. Yes.

13 Q. By the way, is he here today?

14 A. No.

15 Q. Now, can you tell us who Mr. Calderia is?

16 A. Mr. Calderia is our gemologist.

17 Q. And what was his function, in regard now, to the sales
18 operation that you had at Merchant Diamond Group?

19 A. He had nothing to do with the sales, just the appraisals.

20 Q. Was Mr. Calderia an employee of the Merchant Diamond
21 Group?

22 A. No.

23 Q. He was an independent gemologist?

24 A. Yes.

25 Q. Now, did you have occasion to supply Mr. Calderia with

1 the prices that were to be set or the values that were
2 to be set on the various diamonds that were sold by
3 Merchand Diamond Group?

4 A. It would be an approximate price to the appraisal that
5 he had, - he would give first, like this would be the
6 appraisal price.

7 Q. In other words, if he were to appraise a diamond as,
8 say, of a particular quality and a particular clarity
9 and whatever then you would supply him with the price
10 that was to be put on the appraisal certificate for
11 that type of diamond?

12 A. No, I would not supply him with that price.

13 Q. Did you ever have occasion to speak with Mr. Calderia
14 and indicate to him that certain prices should be
15 placed on the appraisal forms by him?

16 A. No, to the best of my ability, never.

17 Q. Do you know of anyone at Merchant Diamond Group who
18 did this?

19 A. No.

20 Q. To the best of your knowledge were the appraisals
21 rendered by Mr. Calderia independent of any influence
22 brought upon him by the members of Merchant Diamond
23 Group?

24 MR. RADLER: I am sorry, I object to this.

25 Number one, I think it is beyond the

1 scope of my direct. Number two, we are
2 not trying the case here. This hearing
3 is directed to their affidavits and I
4 put this witness on the stand to refute
5 contentions that they have made. If
6 they want to attack her credibility that
7 is different.

8 MR. PARRY: I am not attacking her credibility.

9 MR. RADLER: Okay. Then the question is
10 improper.

11 THE COURT: Of course, that is the point, it
12 had nothing to do with direct examination
13 and it had nothing to do with credibility.
14 It is clearly new material. Then why
15 should it be asked?

16 MR. PARRY: Your Honor, one of the contentions
17 was that Mr. Calderia, - this is in the
18 affidavit now, - Mr. Calderia was not
19 an independent gemologist and in respond-
20 ing papers or in moving papers by counsel
21 they come forward and they say this
22 contention is incorrect by the Government
23 and I am just trying to determine through
24 this lady's testimony what Mr. Calderia's
25 relationship was with Merchants Diamond
Group.

1 MR. RADLER: Except that that is not the reason
2 I put her on the stand and I submit it
3 is beyond the scope of my examination.

4 THE COURT: I will sustain the objection.
5

6 BY MR. PARRY:

7 Q Now, you referred to, in your testimony, two suppliers
8 of diamonds, Belle Bijaux and Commonwealth Gem Stones.

9 A Yes.

10 Q Do you know who owns either one or both of those
11 companies?

12 A I believe Belle Bijaux would be a Mr. Bache.

13 Q How about Commonwealth Gem Stones?

14 A I am sorry, I can't recall the owner of that one.

15 Q Do you know a Mr. Kleinberg?

16 A No, I have never heard of him.

17 Q Now, going to the Defendant's Exhibit Number 3, I
18 believe you testified that this contains the invoices
19 from suppliers of diamonds to the Merchant Diamond Group
20 for the period September 1976 to March 1977, is that
21 correct?

22 A Yes.

23 Q Okay. Does this contain all the invoices for that
24 period?

25 A Some of them that we copied did not come out and came

1 two and three together and I would rather have had the
2 originals. I asked, could we have the originals and
3 leave them these but they said, "No".

4 Q All right, but imperfect or not, these are copies of
5 all of the invoices to your knowledge now?

6 A That we photocopied, yes.

7 Q Okay. These are photocopies of all the invoices of
8 diamonds supplied to the Merchant Diamond Group by the
9 various suppliers?

10 MR. RADLER: Your Honor, I object. Just a minute.
11 I object. It is copies of everything
12 that was in the RCMP. They seized their
13 records. We don't have any records. We
14 copied everything they have. That's
15 what she said. We have no records.

16
17 BY MR. PARRY:

18 Q All I want to know is, are these copies of their
19 invoices for all of the diamonds that were sold to
20 Merchant Diamond Group by suppliers or to your knowledge,
21 are there other invoices elsewhere?

22 A No, there are no other invoices elsewhere.

23 Q So to put my question again, are these photocopies of
24 all of the invoices for all of the diamonds that were
25 supplied to the Merchant Diamond Group by its various

1 suppliers during the period, September 1976 to March,
2 1977?

3 A Yes.

4 Q Now, going through these I notice that, say for
5 example, Invoice Number 1938, this was dated September
6 13, 1976; this is from Belles Bijaux, Limited to
7 Merchant Diamond Group?

8 A Yes.

9 Q Now, there is a type one slash one?

10 A Yes.

11 Q Does that mean one carat?

12 A No. You would have to, - that is one sixty. Yes,
13 that would be one carat, quantity three, one carats.

14 Q And allowing for slight variations in the weight of
15 each, it comes to a total of 3.04 carats?

16 A Yes.

17 Q And then there is a notation "VVS Diamonds"?

18 A Yes.

19 Q What does that notation mean?

20 A That is the quality of the diamonds.

21 Q Okay. Does VVS to your knowledge indicate anything
22 concerning the quality of the color of the diamond?

23 A No.

24 Q Well, does it indicate concerning the quality of the
25 cut of the diamond?

1 A I am not a diamond expert.

2 Q All right, so you would not be able to tell us whether
3 or not these invoices indicate anything concerning
4 the quality of either the color of the diamonds that
5 were purchased or the cut of the diamonds, is that
6 correct?

7 A No, I wouldn't.

8 Q Are you aware as a result of your employment with
9 Merchant Diamond Group, are you aware that the price
10 of diamonds can vary according to the color and the
11 cut of the diamond?

12 A All my duties are is just the bookkeeping and the
13 records. The others are not my scope.

14 Q Okay, so these charts where we have these comparisons
15 among the various invoices that you went over, you
16 really couldn't tell us whether or not, say, referring
17 now to Defendant's Exhibit 4, the .20 diamond that was
18 purchased in September of '76 compared in color or
19 quality or whatever with the .20 carat diamond purchased
20 in March of '77?

21 A Yes, that I could.

22 Q You could?

23 A Because in our appraisals it was always VVS 1, GHI and
24 had the - -

25 Q Okay. In preparing this chart did you make reference to

1 those appraisals?

2 A. No. I couldn't get my client files so it would be
3 very easy to bring everything here and show it all out
4 but is very limited when you can't get the files.

5 Q Okay, and these appraisals would have been prepared
6 by who?

7 A. By Mr. Ted Calderia.

8 Q Would you have had any appraisals from someone other
9 than Mr. Calderia?

10 A. Not since my employment.

11 Q Do you know if the suppliers who sold the diamonds would
12 have done an appraisal?

13 A. Not to my knowledge, never.

14 Q Now, I notice on the invoices, going again to
15 Defendant's Exhibit 3, that there are notations, - this
16 is a Belles, - let's go to Invoice Number 1938.

17 A. Yes.

18 Q The Belles Bijaux Invoice. To your knowledge the
19 appraisals were done by Mr. Calderia?

20 A. Yes.

21 Q However, the notation appears here "VVS Diamonds". Can
22 you tell us who placed this typing on the original
23 invoice? Do you know if it was done by Belles Bijaux
24 or was it done by Merchant Diamond Group?

25 A. Never by Merchant Diamond Group.

1 Q So to the best of your knowledge, the suppliers were
2 the ones who always prepared the invoices?

3 A Yes.

4 Q To your knowledge, did anyone at Merchant Diamond Group
5 ever go abroad or overseas to purchase diamonds?

6 A There was a trip with a Mr. Robert Arend, I believe.

7 Q Was Mr. Arend an employee of Merchant Diamond?

8 A He was not an employee but he purchased diamonds for us.

9 Q Do you recall on how many occasions he purchased
10 diamonds for Merchant Diamond Group?

11 A I can't be sure because I didn't go over that but I
12 believe it was twice.

13 Q Do you know if Mr. Arend still purchases diamonds for
14 Merchant Diamond Group?

15 A No, he is not.

16 Q Well, I guess nobody is purchasing diamonds for
17 Merchant Diamond Group right now but prior to the, -
18 prior to the recent unpleasantness - -

19 MR. RADLER: I thought I was the one was supposed
20 to forget there was a jury.

21
22 BY MR. PARRY:

23 Q Yes. All right. Prior to the recent unpleasantness
24 in April of 1977, had Mr. Arend stopped purchasing
25 diamonds for the Merchant Diamond Group?

1 A Yes.

2 Q All right. Do you know when the last time was that
3 he purchased diamonds for Merchant Diamond Group?

4 A No, I am sorry, I don't.

5 Q I would like to go now if we may to Defendant's
6 Exhibit Number 7. I believe you testified that this
7 is a comparison of the diamonds, the appreciation or
8 whatever, the disposition of diamonds that were first
9 sold to customers of Merchant Diamond Group and then
10 were later repurchased by Merchant Diamond Group?

11 A Yes.

12 Q Are you aware of any instances where the Merchant
13 Diamond Group as an accomodation to its customers,
14 assisted a customer in reselling the diamonds somewhere
15 else?

16 A To my knowledge, no.

17 Q Can you tell us whether or not the, - I believe you
18 gave a figure of, - was it 42?

19 MR. RADLER: What is the question, 42 for what?

20 MR. PARRY: 42 buy-backs.

21 MR. RADLER: No.

22 MR. PARRY: Let me look at my notes.

23 THE COURT: Why not get the Exhibit you are
24 referring to, Mr. Parry. The packet is
25 over on the side.

42

1 BY MR. PARRY:

2 Q Okay. Referring now to Defendant's Exhibit 8 and
3 Defendant's Exhibit 9, I believe you testified earlier
4 that Defendant's Exhibit 8 indicates that there were
5 14 buy-backs during the period of February 2, 1977 to
6 April 1977, is that correct?

7 A Yes.

8 Q And Defendant's Exhibit 9 indicates that there were
9 29 Canadian buy-backs during the period February 2,
10 1977 to April 1977.

11 A Yes.

12 Q Now, by the way, I notice that there are certain of
13 these invoices that appear to be carbon copies, is
14 that correct?

15 A That's correct.

16 Q Did you obtain these from the RCMP or were these
17 maintained elsewhere?

18 A No. I was looking for these records. I had asked
19 the RCMP for client stock sold back. They said they
20 didn't have it. I said they did have it and they said
21 they didn't so back to the office. We looked every-
22 where and we found them.

23 MR. RADLER: They left them behind?

24 THE WITNESS: Yes.

25 THE COURT: I wonder, could you help me out

43

1 with your arithmetic?

2 THE WITNESS: Yes.

3 THE COURT: On the chart here which is 7, - I

4 should note this has nothing to do with

5 it, but it does seem that doctors are

6 most interested in diamonds.

7 MR. RADLER: Oh, yes, certainly.

8 THE COURT: 15 out of 32.

9 MR. RADLER: They are our biggest customers.

10 THE COURT: Then you have nine or you have

11 twenty-nine Canadian buy-backs and fourteen

12 American?

13 THE WITNESS: Yes.

14 THE COURT: Are there some left out on the chart?

15 MR. RADLER: No, no, your Honor. The chart, -

16 there are two different things. These

17 are all, - Exhibit 7 is all of the United

18 States buy-backs or resells. That is

19 New York State from September 1976 until

20 we were essentially closed down.

21 THE COURT: All right.

22 MR. RADLER: The Exhibits 8 and 9 are directed

23 to a different contention in the Govern-

24 ment's original papers, namely, that in

25 the period February '77 and April '77, we

1 only bought back ten diamonds, ten
2 transactions. They are two different
3 things. In fact, there were forty-three
4 buy-backs. Exhibit 7 is a different
5 question. I merely wanted to show to
6 the Court graphically that irrespective
7 of the alleged misrepresentations the
8 doctors and other people who sold back
9 diamonds generally profited or at least
10 broke even. That was the whole purpose
11 of 7.

12 THE COURT:

 All right.

13
14 BY MR. PARRY:

15 Q Do you know if there were any other requests for
16 buy-backs during, - well, since we are dealing with
17 several periods here, let's go to Defendant's Exhibit
18 Number 7. That covers the period when Merchant Diamond
19 Group was operating in New York State?

20 A Yes.

21 Q That's from September of '76?

22 A Yes.

23 Q To April of '77?

24 A March.

25 Q March of '77?

45

1 A I believe that's what he's got, yes.

2 Q During that period are you aware of any other requests
3 for buy-backs that were not honored by Merchant Diamond
4 Group?

5 A To the best of my knowledge, I wouldn't know that.

6 Q And during the entire period of your employment with
7 Merchant Diamond Group are you aware of any requests
8 for buy-backs that were no honored by the Merchant
9 Diamond Group?

10 A Not to my knowledge.

11 Q So to the best of your knowledge, whenever a customer
12 asked to have his diamonds repurchased by the Merchant
13 Diamond Group they did so.

14 MR. RADLER: I object to that. She said she
15 has no knowledge of any alleged refusals
16 to buy back. I object to the question.

17 THE COURT: It can only be her knowledge. If
18 requests were made to somebody else and
19 not called to her attention, she would
20 not know.

21 MR. RADLER: I mean she is essentially a record
22 keeper.

23 THE COURT: Right, the witness is a record
24 keeper, not an executive making a decision
25 so that I suppose that if one of the

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officers received a telephone call which
was not called to her attention, she
would not know about it.

MR. PARRY: That's correct.

THE COURT: I will sustain the objection. Let
us go ahead.

BY MR. PARRY:

Q Were you ever advised by Mr. Doren in approximately
March of 1977 that there were to be no further buy-backs
from Canadian customers?

MR. RADLER: I really, - I am sorry but I really
object to this. It is beyond, again, the
scope of direct examination and I think
Mr. Parry, and probably it is a proper
trial tactic, seeking to use this
hearing which attacks his papers on a
trial on the merits. That is not what
we are here for and I object to it.

THE COURT: I will overrule that objection.

BY MR. PARRY:

Q You may answer.

A What was the question again? I am sorry.

MR. PARRY: Would you read the question.

1 THE COURT: Did Mr. Doren ever tell you after, -
2 what was the date?
3 MR. PARRY: Approximately March of 1977.
4 THE COURT: March of 1977 that you were not
5 to make arrangements for any more resales
6 or buy-backs of diamonds?
7 THE WITNESS: No.
8
9 BY MR. PARRY:
10 Q And this would be from Canadian customers?
11 A To my knowledge, no.
12 THE COURT: Mrs. Dinino, your function is, you
13 were a bookkeeper?
14 THE WITNESS: Not a bookkeeper. I ran the office
15 and I did the daily figures and I knew
16 the banking procedures and I gave all
17 the figures to the bookkeeper.
18 THE COURT: Did the letters requesting buy-backs
19 come to you, would all those requests
20 come to you?
21 THE WITNESS: No.
22 THE COURT: Someone else would make a decision
23 and then give you a direction of some
24 kind. Would you make the checks up and
25 so forth?

1 THE WITNESS: I made the checks up.

2 THE COURT: But you did not participate in
3 conversations with customers, is that
4 right?

5 THE WITNESS: I participated in conversations
6 with the customers if the diamonds were
7 not shipped to the customer, if there
8 was a delay in shipment then I would get
9 on the phone and explain to the customers
10 what the delay was.

11 THE COURT: I see. Very well. Go ahead.

12
13 BY MR. PARRY:

14 Q May I have just a moment, your Honor, to examine these
15 documents? Mrs. Dinino, referring now to the documents
16 contained in Defendant's Exhibit Number 9, can you tell
17 us from examining these documents when the last buy-backs
18 were made, when the last buy-back was made?

19 A This one here is April 5, '77; this one here April 5, '77.
20 These are the Canadians and this is February 3rd, '77;
21 March 26th, '77; March 29th, '77; March 29th, '77;
22 March 29th, '77; March 28th, '77.

23 Q All right. Now, without reading all of them - -

24 A Yes.

25 Q To your knowledge, is this April 5, 1977 the last of

1 the Canadian buy-backs that you are aware of?

2 A. Not necessarily because there were files that weren't
3 put on here yet, that weren't filed.

4 Q. Would those files be similar to these records,
5 Defendant's Exhibit 9?

6 A. They would be invoices in a file for filing when the
7 girls got to them and apparently, - what I am saying,
8 this may be all of them but I am not sure because
9 there is a stack of filing still to be filed and in
10 there there still could be some more buy-backs.

11 Q. Did the RCMP - -

12 A. They have got those records, yes. They couldn't find
13 those records when I asked them for them. They didn't
14 know which file it was.

15 Q. Based on the records contained here in Defendant's
16 Exhibit 9, the last buy-back that is indicated in here
17 was April 5?

18 A. Yes.

19 Q. And then prior to that it is February 3, is that right?

20 A. Yes, and there is March in here. They are out of order,
21 you see.

22 Q. Oh, I see. That will give me something to do tonight.
23 All right. Directing your attention now to approximately
24 February 22, 1977, I want to ask you if you recall
25 having had any conversation with Mr. Doren in which he

1 indicated to you that if a customer were holding
2 forty to fifty thousand dollars in diamonds, that he
3 had purchased from the Merchant Diamond Group, that he
4 would not buy back those diamonds?

5 MR. RADLER: I object to this, if the Court
6 please. This isn't the way to cross
7 examine this witness. If he has got
8 some statement - -

9 THE COURT: We get back to this, Mr. Parry,
10 you have an affidavit here which must
11 stand or fall on its own merits. If you
12 have some other information which the
13 agents have which will clearly support
14 what you say that might be a factor but
15 certainly you would not know ahead of
16 time what this witness knew, I do not
17 believe, so it certainly does not have
18 anything to do with direct examination.

19 MR. PARRY: Well, sir, the problem is that the
20 defense or the defendant has introduced
21 these exhibits on buy-backs.

22 THE COURT: That is right.

23 MR. PARRY: And they presented testimony about
24 buy-backs.

25 THE COURT: Right.

1 MR. PARRY:

And I think I am entitled, since
2 they have produced this testimony, to
3 inquire into the nature of these buy-
4 backs, just what the policy was of
5 Merchant Diamond Group in regard to
6 buy-backs and that's the only reason
7 for the question.

8 MR. RADLER:

Now, if your Honor please, I intro-
9 duced records of the company and I
10 introduced this witness to verify and
11 authenticate the records which is her
12 only purpose here. The records will
13 speak for themselves. They don't lie.
14 We are not here discussing the philosophy
15 of buy-backs.

16 THE COURT:

Evidently, Mr. Parry, because you
17 have asked the question, you have some
18 independent evidence on that and we will
19 await that. I will sustain the objection.
20 It seems to me it is not proper cross
21 examination.

22 BY MR. PARRY:

23 Q Referring now to Defendant's Exhibit Number 13, I
24 believe you testified that these are the cards or the
25

1 client cards of those persons who have paid their money
2 in but they haven't received their diamonds?

3 A. Yes.

4 Q. And I believe you testified also that to your knowledge,
5 there are no other persons, other than these persons,
6 who are in that situation?

7 A. Yes.

8 Q. And you ran a total of the money that they paid in and
9 there was \$145,000, approximately?

10 A. Yes.

11 Q. Of their money, and that is in the client's trust
12 account?

13 A. Yes.

14 Q. You testified, however, that there was a total of
15 \$375,000 in that client's trust account?

16 A. Yes.

17 Q. Do you know what constitutes the difference between
18 the two amounts, whose money that is in that account?

19 A. That would be the money of Merchant Diamond Group for
20 delivering the diamonds.

21 Q. So that that was money that was left in the account
22 after diamonds had been sent out?

23 A. Yes.

24 Q. And did that amount of money, some \$230,000 approximately
25 now, did you regularly accumulate amounts of money like

1 that in that client's trust account?

2 A. If there was no reason to transfer it, we just left
3 it there because we could transfer it at any time
4 that we ship the diamonds. It is the same in this
5 account, as long as we never took the funds from the
6 clients, we could leave as much money in that account
7 as we wanted to because if we transfer from the account
8 to the operating, it wouldn't matter.

9 Q. Okay, so you regularly had Merchant Diamond Group
10 money in that account and it stayed there for some
11 period of time after the diamonds had been sent out
12 to the customers?

13 A. Yes.

14 Q. Referring now to the inventory of the items removed
15 from the safe deposit box here in Buffalo, you testified
16 that that inventory listed merchandise that had been
17 returned to the Merchant Diamond Group?

18 A. Returned and replaced.

19 Q. Okay. Well, it had been returned and then other
20 diamonds had been sent out to the customers? What I
21 am asking is, how did all that stuff come to be in that
22 safe deposit box?

23 A. Well, some of the names on the list you will find on
24 the list here that were repurchased.

25 Q. Yes.

1 A. And then some of them would have been exchanges that
2 they bought a small package and then they wanted a
3 larger package so therefore we couldn't take those
4 diamonds across to Canada and we would keep them in the
5 safe deposit box so we would have to buy the diamonds
6 here and take them across the Border and ship them
7 another order. If they wanted to exchange, we did that.

8 Q. So that a customer, who, say, was holding three one
9 carat diamonds could send in the three one carat and
10 get a package of five?

11 A. No. If they got a package and they liked it, like two
12 twenty-fives and then they thought, well, maybe they
13 would like a half carat instead of the two twenty-fives
14 and this would happen.

15 Q. All right, and you say that also there were diamonds
16 that were sent in for repurchase by Merchant Diamond
17 Group, some of those were also contained?

18 A. Yes.

19 Q. Were there any diamonds contained in the safe deposit
20 box that had been placed there by Merchant Diamond Group
21 pending their being sent out to customers on purchases,
22 to your knowledge?

23 A. Not to my knowledge.

24 Q. Referring now to the inventory, I am using the same
25 exhibit that was shown to you by Mr. Radler just so

1 there won't be any confusion here.

2 A Yes.

3 Q Okay. This is the inventory left behind by the Postal
4 Inspector and when did you first see this inventory?

5 A When it was shown to me, this one. Ours is in our
6 records at the RCMP Building and this is what was shown
7 to me and this is when I have seen it.

8 Q And when and where was that?

9 A This shown to me?

10 Q Yes.

11 A It was shown to me in our office in Toronto yesterday
12 I saw this.

13 Q All right, and that was shown you by Mr. Radler?

14 A Yes.

15 Q And when you examined this, what, if anything, did you
16 do? Did you go to your records?

17 A I can't go to my records. The RCMP have those.

18 Q You didn't make an appointment to go over and look at
19 the records?

20 A You can't just make an appointment like that. You
21 have got to phone and wait until they give you time and
22 then you go.

23 Q Okay. Well, whether or not that is an appointment,
24 let's go on to this. You have the names of several
25 individuals listed down the left-hand side. You have

1 disk numbers, you have numbers of diamonds - -

2 MR. RADLER: Excuse me, she doesn't.

3 THE COURT: She does not. There are.

4
5 BY MR. PARRY:

6 Q All right, there are on this piece of paper in front
7 which has been previously referred to, there
8 names of individuals, there are disk numbers, there
9 are numbers of diamonds, there are carat weights and
10 there are dates, presumably the dates were taken off
11 the disks. Now, my question to you is, did you recognize
12 these names when you saw this list or did you know what
13 was kept in the safe deposit box or how did you come
14 to your conclusion that these, - what is indicated here
15 were these diamonds that were returned to the Merchant
16 Diamond Group by customers or were exchanged or whatever,
17 how did you reach that conclusion?

18 A I am just going by my records, if I can, and just
19 taking the assumption that this is a true copy of what
20 was in there and if I could have had my records I could
21 have definitely said "Yes, this is it".

22 Q Okay, but this, in other words, you saw this list and
23 it was your knowledge as a result of your employment
24 at Merchant Diamond Group that there were two categories
25 of diamonds that were kept in that safe deposit box?

1 A Yes.

2 Q And those are the two categories you have already
3 described?

4 A Yes.

5 Q I would like to go through Defendant's Exhibit Number
6 8 if I may. In looking at these invoices contained
7 herein, I just want to make sure my interpretation of
8 this is correct. You have diamond purchases here and
9 purchases X'd out?

10 A Yes.

11 Q And "sale" is written in and that notation indicates
12 to you that what we are talking about here is, say,
13 with the man on top, Mr. Robert Steele, that Mr. Steele
14 sold his diamond to Merchant Diamond Group?

15 A Yes.

16 Q And I notice that there is a price and then a net
17 amount amount and do you know why they list a price
18 and then a net amount?

19 A Yes. They did that because this is one package at the
20 unit price of six forty-two fifty. Therefore, the net
21 amount is six forty-two fifty. If there were two
22 packages it would be two packages at six forty-two
23 fifty and the total amount would be in there.

24 Q Okay. Well, here we have, going to the next one, Mr.
25 Robert H. DeGreer, you have like two packages, Number 2A

1 with the price two thousand three hundred sixty-six
2 fifty and then you go over to the net amount two thousand
3 three sixty-six fifty.

4 A If you look at Mr. DeGreer's card that is a typographical
5 error. Can only be one package Number 2A for that
6 amount and one figure. That is a typographical error.

7 Q Okay. Now, these contain sales and at some point do
8 they begin to list purchases by these people of the
9 same diamonds?

10 A No, not in this group.

11 Q Where would that group be?

12 A The sales?

13 Q Yes.

14 A With the RCMP. They have all the records.

15 MR. PARRY: Okay.

16 MR. RADLER: For the record, if I might, your
17 Honor, all these are as Exhibit A are
18 the invoices showing the number of
19 transactions that we had which involve
20 a repurchase by us in the time frame
21 that you claim we only had ten, namely,
22 February 14th to April, '77. That's all
23 these are is just covering invoices. You
24 can get the data upon which Exhibit 7
25 is based by an examination as we have

1 done of Exhibits 5 and 6 which I might
2 add have been in the possession of the
3 RCMP and presumably in the possession
4 of the United States Government for two
5 months.

6
7 BY MR. PARRY:

8 Q Okay. Well, statement of counsel notwithstanding,
9 when you assisted in producing defense Exhibit Number 7,
10 did you make reference to the content of Defendant's
11 Exhibit Number 6? This is to obtain now the date of
12 purchase and the purchase price of these diamonds listed
13 on Defendant's Exhibit Number 7.

14 A Yes.

15 Q Now, let's just go to the one on top. This is Dr.
16 Howard I. Mark.

17 A Yes.

18 Q Now, there are a whole series of typed notations here,
19 if we could just go through them so I can get an
20 understanding what these things mean.

21 A Yes.

22 Q September 22, 1976 he purchased - -

23 A Package 3A.

24 Q Package Number 3A?

25 A Yes.

1 Q And that consisted of what?

2 A Five by thirty.

3 Q Five by thirty?

4 A Yes, .30.

5 Q That is what, .30 carats?

6 A Yes.

7 Q For two thousand fifty-eight?

8 A Yes. That's what he paid for it, September 22nd.

9 Q Okay, and who is J. Wasser?

10 A A salesman.

11 MR. RADLER: Excuse me, just so we are clear,
12 could you explain the twelve fifty
13 difference, the \$12.50 difference?

14 THE COURT: On the chart it appears to be
15 \$2,070.50 and on the copy of your note
16 there it is a different figure.

17 THE WITNESS: Twelve fifty would be handling
18 charge.

19 THE COURT: Is that reflected on your record
20 there?

21 THE WITNESS: No, we don't put the handling charge
22 on here.

23 THE COURT: I see. That was an amount that was
24 included in every - -

25 THE WITNESS: Yes. Every purchase had a handling
charge.

1 BY MR. PARRY:

2 Q Now, by the way, was there a charge on buy-backs?

3 A Yes, less 4 per cent.

4 Q And, - all right. Now, we go along and we get down
5 to a notation, February 4th, '77, Number 1093 mailed.

6 A Yes.

7 Q What does that refer to?

8 A That refers to, that I mailed him check Number 1093.
9 He phoned me and said he couldn't wait for the funds
10 because I had here, I stopped payment on it and I wired
11 him the funds. He didn't receive it so I stopped
12 payment, February 10th. I wired him the funds to cover
13 that.

14 Q Okay, so that unless the notation appears, referring
15 now to a line, January 9, 1977, unless the notation
16 appears "sold", Package 3A, we are talking about
17 purchases by this customer, is that true?

18 A Yes.

19 Q And if the customer, - if you buy back the diamonds
20 from the customer, it will appear on here?

21 A Yes, as a sold.

22 Q Okay.

23 A That's right. That's on our client's cards.

24 Q Okay, and to your knowledge, that would be true on all
25 the rest of these cards? That was sort of a standard

1 way of doing it?

2 A Yes, it was.

3 Q Okay. May I have just a moment, Judge. Mrs. Dinino,
4 referring now to Defendant's Exhibit Number 6 which
5 are the client cards, would you be able to determine
6 here in what instances a client's diamonds were bought
7 back for the purpose of selling him even more diamonds
8 at a later time?

9 A No.

10 Q "No", but any transactions with that client would be
11 on that card?

12 A Yes.

13 Q And would exchanges be reflected on these cards?

14 A Yes.

15 Q Is there a particular notation that would indicate
16 an exchange?

17 A It would have like "Diamonds returned" on the card.

18 Q May we go through here and if you can just find one for
19 me so I can see it.

20 A "Diamonds", would that be it, it is very hard. It
21 would be written out, you see, and pencil did not recopy
22 on the cards like here, there are some notations here.
23 It would be written on it, "Diamonds returned to Buffalo"
24 or something like that. That is "Diamonds" and something
25 on there.

1 Q All right.

2 A Pencil did not copy on the client's cards.

3 Q All right.

4 A That was our trouble with it but there would be
5 written notations on the cards. I am afraid we may
6 not find them here because, as I say, pencil did not
7 copy. "Diamonds returned to Buffalo office". There
8 would also be, - see, if I only had my records I could
9 be very explicit about this. This gentleman bought
10 the diamonds; payment was stopped so therefore we
11 couldn't bring the diamonds back across and the diamonds
12 would be returned to the Buffalo office and this is
13 what would be on the cards.

14 Q Okay, and in this instance we are referring now to a
15 card for a Mr. Woodworth, George Woodworth.

16 A Yes.

17 Q And that is contained in Defendant's Exhibit 6?

18 A Yes.

19 Q And that is a typed notation?

20 A Yes. That's why it would show up.

21 Q Do you know if - -

22 THE COURT: Excuse me. I am dense, I suppose.

23 That is what puzzled me.

24 THE WITNESS: Yes.

25 THE COURT: Mr. Woodworth's name does not appear

1 on Exhibit 7.

2 THE WITNESS: Yes.

3 THE COURT: But you say you returned diamonds
4 to him?

5 THE WITNESS: That's in the inventory. No. We
6 sold him diamonds. He stopped payment
7 on his check and we had shipped him the
8 diamonds.

9 THE COURT: It was not a resale?

10 THE WITNESS: No.

11
12 BY MR. PARRY:

13 Q Do you know if there were any records maintained of
14 clients who requested resales or repurchase of their
15 diamonds and these, - the repurchase was not made?

16 A Not that I would know of but there may have been and
17 if there were, the letters are in their files. Every-
18 thing is there.

19 Q What files would those be?

20 A The client's files.

21 MR. PARRY: Mrs. Dinino, thank you.

22 THE COURT: Mr. Radler, I want to go ahead with
23 this just as swiftly as I can but as I
24 explained to you it seems to me the next
25 day we can come together would be Monday.

1 MR. RADLER: All right, sir.

2 THE COURT: There are some discrepancies you

3 have shown here but I think we ought to

4 wait until we get the rest of the record.

5 We have gone along this afternoon. How

6 much more time do you think you will need?

7 MR. RADLER: Probably no more than a couple of

8 hours, your Honor.

9 THE COURT: Do you think we could finish on

10 Monday?

11 MR. RADLER: Are we talking about starting in

12 the afternoon?

13 THE COURT: Yes.

14 MR. RADLER: Well, our case or whatever it is,

15 our presentation of evidence against this

16 affidavit which is really all this is - -

17 THE COURT: Yes.

18 MR. RADLER: Should be concluded that afternoon,

19 certainly, without any question.

20 THE COURT: Mr. Parry, what do you thing then?

21 MR. PARRY: Well, I have Inspector Snyder and I

22 don't know how long they care to cross

23 examine him. I would only put him on

24 the stand to identify the affidavits and

25 the search warrants and then open him up

1 to cross examination.

2 MR. RADLER: Would that be your case?

3 MR. PARRY: Well, whether or not we will have

4 an expert - -

5 THE COURT: You have not heard it all. You

6 better not promise because you have not

7 heard the rest of the evidence here by

8 the petitioners. In any event, we will

9 be in recess.

10 MR. RADLER: Your Honor, might I, for the record

11 then, and I am really troubled by this,

12 but I want to point something out to the

13 Court and I really don't want to be

14 confronted with this all the time. It

15 is this whole question of ex parte

16 application or at least failure to serve

17 us with the papers. When we were here

18 last on June 10th, Friday, your Honor

19 extended the freeze order until this

20 forthcoming Friday, the 17th, and the

21 application and order which contains some

22 substantive information and which is

23 signed by Mr. O'Keefe on behalf of, I

24 assume, Mr. Parry, was never served on us

25 and we just got it because we went to the

1 bank to get the records and it contained
2 all sorts of substantive information.

3 THE COURT:

4 You must, Mr. Parry, - we went
5 through all of this business and I am
6 sorry, first of all, I signed that
7 because I believed that that was the
8 understanding.

9 MR. RADLER:

10 I don't quarrel with the extension
11 because that is what your Honor said
12 but it has got all sorts of stuff in
13 here that I object to and if it is going
14 to be presented to the Court, we ought
15 to see it instead of being advised of it
16 when we subpoena bank records today,
17 five days later. I just think it is
18 wrong.

19 THE COURT:

20 Mr. Parry, you have an immediate
21 problem again this Friday. Your freeze
22 order runs to the 17th. If you are going
23 to make, - if you want to make another
24 application, show it to counsel before
25 you bring it over to me and then if you
have objection to it, let me know, but
do not bring a paper in directly to me
unless you show it to counsel first.

1 I will be available all day tomorrow.
2 MR. RADLER: We will be in our office, Mr.
3 Fitzgerald and myself.
4 MR. PARRY: Fine.
5 MR. RADLER: Thank you, your Honor.
6 THE COURT: We will be in recess.

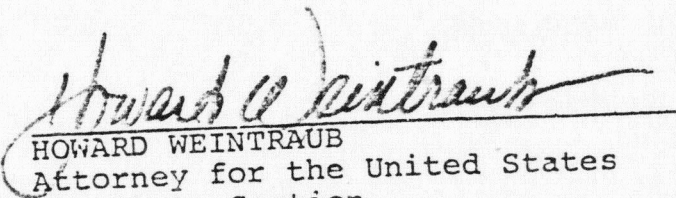
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8 (Recess taken at 5:01 p.m.)
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of September
1977, a copy of the foregoing Brief and Appendix were served by
mail on the following:

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